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No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1989

MARGARET B. COMORA, EMANUEL M. COMORA, and MARGARET B. COMORA and EMANUEL M. COMORA as Trustees of the COMORA FAMILY TRUST,

Petitioners,

v.

IRVIN RADELL, NANCY RADELL, DAVID RADELL, and DAVID and MARY RADELL, as Trustees of the DAVID AND MARY RADELL FAMILY TRUST,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA SECOND APPELLATE DISTRICT, DIVISION ONE

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QUESTION PRESENTED

This case presents the following important question left open by this Court's decisions in *Banker's Life & Casualty Co. v. Crenshaw*, 486 U.S. 785, 108 S.Ct. 1645 (1988), and *Browning-Ferris v. Kelco Disposal*, ___ U.S. ___, 109 S.Ct. 2909 (1989):

Does the Due Process Clause of the Fourteenth Amendment permit the states to give juries unlimited discretion to award punitive damages without established standards on how those damages are to be measured?

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MARGARET B. COMORA, EMANUEL M. COMORA, and MARGARET B. COMORA and EMANUEL M. COMORA as Trustees of the COMORA FAMILY TRUST,

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IRVIN RADELL, NANCY RADELL, DAVID RADELL, and DAVID and MARY RADELL, as Trustees of the DAVID AND MARY RADELL FAMILY TRUST,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA SECOND APPELLATE DISTRICT, DIVISION ONE

Petitioners Margaret B. Comora, Emanuel M. Comora, and Margaret B. Comora and Emanuel M. Comora as Trustees of the Comora Family Trust, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the California Court of Appeal for the Second Appellate District, Division One, entered in this proceeding on June 28, 1989.

OPINIONS BELOW

The opinion of the California Court of Appeal for the Second Appellate District, Division One, is unreported and is reprinted in the Appendix. App. 1-70. Originally, it was certified for partial publication. *Radell v. Comora*, 211 Cal.App.3d 1244, 259 Cal.Rptr. 891 (1989). On July 21, 1989, this opinion was modified to add footnote 5 on page 41, at the end of line 12. *See* App. 71-72.

When the California Supreme Court denied petitioners' petition for review on September 21, 1989, the California Supreme Court ordered the Court of Appeal's opinion decertified from partial publication. A copy of the California Supreme Court's order is reprinted in the App. 73.

JURISDICTION

The judgment and opinion of the Court of Appeal of the State of California, Second Appellate District, Division One, was filed on June 28, 1989. App. 1. On September 21, 1989, the California Supreme Court denied petitioner's timely petition for review on the Court of Appeal decision. App. 73.

On December 7, 1989, Justice O'Connor ordered the time for filing this petition for writ of certiorari be extended to and including January 19, 1990. App. 74.

The jurisdiction of this Court to review the judgment of the California Court of Appeal is invoked under 28 U.S.C. § 1257(a).

This petition is being filed prior to the expiration of the extension of time to file granted by Justice O'Connor, which extension expires of January 19, 1990.

CONSTITUTIONAL PROVISIONS INVOLVED

Fourteenth Amendment, § 1, U.S. Constitution:

> . . . [N]or shall any State deprive any person of life, liberty, or property without due process of law. . . .

STATUTES INVOLVED

California Civil Code § 3294:

[Current version of statute]:

> (a) In an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant.
>
> (b) An employer shall not be liable for damages pursuant to subdivision (a), based upon acts of an employee of the employer, unless the employer had advance knowledge of the unfitness of the employee and employed him or her with a conscious disregard of the rights or safety of others or authorized or ratified the wrongful conduct for which the damages are awarded or was personally guilty of oppression, fraud, or malice. With respect to a corporate employer, the advance knowledge and conscious disregard, authorization, ratification

or act of oppression, fraud, or malice must be on the part of an officer, director, or managing agent of the corporation.

(c) As used in this section, the following definitions shall apply:

(1) "Malice" means conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others.

(2) "Oppression" means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights.

(3) "Fraud" means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury.

(d) Damages may be recovered pursuant to this section in an action pursuant to Section 377 of the Code of Civil Procedure or Section 573 of the Probate Code based upon a death which resulted from a homicide for which the defendant has been convicted of a felony, whether or not the decedent died instantly or survived the fatal injury for some period of time. The procedures for joinder and consolidation contained in Section 377 of the Code of Civil Procedure shall apply to prevent multiple recoveries of punitive or exemplary damages based upon the same wrongful act.

(e) The amendments to this section made by Chapter 1498 of the Statutes of 1987 apply to all actions in which the initial trial has not commenced prior to January 1, 1988.

The instant case was tried under this statute as it read prior to the 1987 amendments which substituted the "clear and convincing evidence" standard for the prior "preponderance of the evidence" standard in subdivision (a). The 1987 amendments added "despicable" and "wilfull" in subdivision (c)(1), "despicable conduct that subjects" for "subjecting" in subdivision (c)(2), and the entirety of subdivision (e).

STATEMENT OF THE CASE

This case involves disputed claims between family members regarding an apartment building (the Oakhurst property) located in Beverly Hills. Petitioner Margaret Comora is Nancy Radell's daughter by a previous marriage. Petitioner Emanuel Comora is Margaret's husband. Respondent Irvin Radell is Nancy Radell's husband and Margaret Comora's stepfather, while David Radell is Nancy's son and Margaret Comora's half-brother.

In 1964, Emanuel Comora bought the apartment building, which is the core of this litigation. In 1970, Emanuel and Margaret Comora were threatened with foreclosure. Irvin and Nancy Radell stepped in to provide the Comoras needed monies to halt the foreclosure. The main issue at trial was whether, by providing these monies to halt foreclosure, the Radells became equal partners of the Comoras in the ownership of the Oakhurst property (as well as being mortgagees) or whether the Radells were merely mortgagees with no ownership interest.

On March 15, 1984, respondents Irvin, Nancy and David Radell filed suit against the petitioners

individually and as trustees of the Comora Family Trust. As originally pleaded, the complaint sought (1) declaratory relief to determine whether respondents had partnership interests in the Oakhurst property and to compel execution of a deed in respondents' favor for a 50 percent interest, and (2) an accounting. A subsequent amended complaint added a cause of action for fraud, seeking compensatory and punitive damages. Petitioners cross-complained for declaratory relief, quiet title, duress, usury and conversion.

The case was tried to a jury and lasted more than two months. After all the evidence was presented, the trial court permitted the respondents Radell to amend their complaint according to proof to add, among other amendments, a sixth cause of action for "tortious repudiation of the partnership agreement" under the bad faith breach of contract rationale set forth in the California Supreme Court's decision in *Seaman's Direct Buying Service, Inc. v. Standard Oil Co.*, 36 Cal.3d 752, 767-774, 206 Cal.Rptr. 354, 686 P.2d 1158 (1984).

Prior to commencing its deliberations, the jury was given the following standard California jury instruction on punitive damages:

BAJI 14.71
PUNITIVE DAMAGES
RECOVERY OF AND MEASURE

> If you find that plaintiff suffered damage as a [proximate] result of the conduct of the defendant on which you base a finding of liability, you may then consider whether you should award punitive damages against defendant for the sake of example and by way of punishment.

You may in your discretion award such damages, if, but only if, you find by a preponderance of the evidence that said defendant was guilty of oppression, fraud or malice in the conduct on which you base your finding of liability.

"Malice" means conduct which is intended by the defendant to cause injury to the plaintiff or carried on by the defendant with a conscious disregard for the rights of others. A person acts with conscious disregard of the rights of others when he or she is aware of the probable dangerous consequences of his or her conduct and willfully and deliberately fails to avoid those consequences.

"Oppression" means subjecting a person to cruel and unjust hardship in conscious disregard of that person's rights.

"Fraud" means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury.

The law provides no fixed standards as to the amount of such punitive damages, but leaves the amount to the jury's sound discretion, exercised without passion or prejudice.

In arriving at any award of punitive damages, you are to consider the following:

(1) The reprehensibility of the conduct of the defendant,

(2) The amount of punitive damages which will have a deterrent effect on the defendant in the light of defendant's financial condition,

(3) That the punitive damages must bear a reasonable relation to the actual damages.

> If you find that plaintiff is entitled to an award of punitive damages against defendant, you shall state the amount of punitive damages separately in your verdict. BAJI[1] 14.71 (italics added).

The jury was unable to apply criterion (2) of the foregoing instruction to the instant case because no evidence was presented to the jury of petitioners' financial condition.

On March 21, 1986, the jury returned general verdicts totalling $124,224.57 in compensatory damages and $1,250,000 in punitive damages against the Comoras. In addition, the jury awarded Nancy Radell $125,000 in damages for emotional distress.

In addition to the $1,499,224.57 in damages awarded by the jury, the trial judge added an additional $1,139,372.90 against the Comoras for the following: $603,681.41 for the unpaid balance on Nancy Radell's deed of trust, $309,989.08 for the unpaid balance on David Radell's deed of trust, and $225,701.52 in attorneys' fees, plus costs of suit. All amounts were subject to interest from the date of verdict or judgment.

Viewing the facts in the light most favorable to the judgment, from their investment of $43,000 and a loan of

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[1] BAJI is the abbreviated reference to *California Jury Instructions – Civil* (7th ed. 1986), drafted by the Committee on Standard Jury Instructions, Civil, of the Superior Court of the Los Angeles County, California and published by West Publishing Company. The abbreviation BAJI is an acronym for "book of approved jury instructions."

$150,000, the Radells received almost $2.5 million in damages, plus a half interest in an apartment building worth approximately $3.5 million. The value of the total judgment for respondents Radell was $4,250,000 plus interest. These sums were awarded over and above the many thousands of dollars the Radells had received in rental income, management fees and rent-free apartments over a thirteen-year period.

HOW THE FEDERAL QUESTION WAS RAISED

The California Court of Appeal decided the federal due process question raised here on the merits. *See* App. 50-55. Where the state court holds that a federal question is properly before it and then proceeds to consider and dispose of that issue, it is well settled by decisions of this Court that the federal questions have been properly raised in the state courts. *Orr v. Orr*, 440 U.S. 268, 274-75 (1979); *Whitney v. California*, 274 U.S. 357, 360-61 (1927).

REASONS FOR GRANTING THE WRIT

I

THIS CASE MEETS THE EXPRESSED CRITERIA OF THIS COURT FOR REVIEW OF THE CONSTITUTIONALITY OF DISPROPORTIONATE, STANDARDLESS PUNITIVE DAMAGE AWARDS

In three cases in the last four years this Court has acknowledged the importance of the question of the application of the Due Process Clause to punitive damage awards, but has declined to reach the question in the

particular case before the Court. *Browning-Ferris Industries, Inc. v. Kelco Disposal, Inc.*, ___ U.S. ___, 109 S.Ct. 2909 (1989); *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 108 S.Ct. 1645 (1988); *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813 (1986).

Two days before the California Court of Appeal opinion was filed, this Court held that punitive damages did not violate the Eighth Amendment prohibition against excessive fines, but expressly left open the question of whether punitive damages might violate the due process guarantees of the Fifth and Fourteenth Amendments. *Browning-Ferris Industries, Inc. v. Kelco Disposal, Inc., supra*, ___ U.S. ___, 109 S.Ct. at 2921. In the *Browning-Ferris* case, four justices of this Court expressed grave doubt that punitive damages meet constitutional due process standards. Justice Brennan joined the majority in *Browning-Ferris* "on the understanding that it leaves the door open" to a due process attack on punitive damages. He wrote:

> "[J]uries are left largely to themselves in making this important, and potentially devastating, decision. . . .[P]unitive damages are imposed by juries guided by little more than an admonition to do what they think is best. Because '[t]he touchstone of due process is protection of the individual against arbitrary action of government,' (citations omitted), I for one would look longer and harder at an award of punitive damages based on such skeletal guidance than I would at one situated within a range of penalties as to which responsible officials had deliberated and then agreed." *Browning-Ferris Industries, Inc. v. Kelco Disposal, Inc., supra*, ___ U.S. at ___, 109 S.Ct. at 2923.

In an opinion in which Justice Scalia joined, Justice O'Connor wrote:

> "Appellant has touched on a due process issue that I think is worthy of the Court's attention in an appropriate case. Mississippi law gives juries discretion to award any amount of punitive damages in any tort case in which a defendant acts with a certain mental state. In my view, because of the punitive character of such awards, there is reason to think that they may violate the Due Process Clause. . . .This grant of wholly standardless discretion to determine the severity of the punishment appears inconsistent with due process." *Bankers Life & Casualty Co. v. Crenshaw, supra,* 486 U.S. at ___, 108 S.Ct. 1655-1656 (concurring op. of O'Connor, J. and Stevens, J.).

In the past year, a number of state and federal courts have considered and summarily rejected Due Process challenges to unlimited punitive damage awards. These courts acknowledge this Court's statements in *Aetna, Bankers Life,* and *Browning-Ferris,* but find this Court's prior decisions, as adversely dispositive of constitutionality. *E.g., Potomac Electric Power Co. v. Smith,* 79 Md. App. 591, 558 A.2d 7689, 792 (1989) ("[w]hat the [United States] Supreme Court has declared constitutional we may not put asunder, consequently we hold in the case *sub judice* the award of punitive damages did not violate any aspect of the Constitution," citing *Day v. Woodworth,* 54 U.S. (13 How.) 363 (1851), and *Curtis Publishing Co. v. Butts,* 388 U.S. 130 (1967); *see Kraus v. Santa Fe Southern Pacific Corp.,* 878 F.2d 1193, 1200 (9th Cir. 1989) ("Under current constitutional standards, the jury's discretion regarding punitive damages . . . is 'limited only by the

gentle rule that [they] not be excessive,' " citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1973)).[2]

There is no reason to believe the law in this area will develop further without guidance from the Court. The question of "whether due process acts as a check on undue jury discretion to award punitive damages," *Browning-Ferris*, 109 S.Ct. at 2921, is irresolvable, given

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[2] *Accord: Miller v. Cudahy Co.*, 858 F.2d 1449, 1459 (10th Cir. 1988), *cert. denied*, 190 S.Ct. 3265 (1989); *Fed. Dep. Ins. Corp v. W.R. Grace & Co.*, 691 F.Supp. 87, 97-102 (N.D.Ill. 1988), *aff'd in part and rev'd in part*, 877 F.2d 614 (7th Cir. 1989); *Kociemba v. G.D. Searle & Co.*, 707 F.Supp. 1517, 1535-36 (D.Minn. 1989); *Williams Pipe Line Co. v. City of Mounds View*, 704 F. Supp. 914, 921 n. 7 (D.Minn. 1989); *Guy v. Commonwealth Life Ins. Co.* 698 F.Supp. 1305, 1316 (N.D.Miss. 1988); *Horowitz v. Schneider Nat'l. Inc* , 708 F.Supp. 1573, 1578 (D.Wyo. 1989). The cases relied on by these courts for their unanimous rejection of the Due Process arguments advanced here include this Court's decisions in *Day v. Woodworth, supra, Curtis Publ. Co. v. Butts, supra,* and *Smith v. Wade*, 461 U.S. 30 (1983), and the California decision in *Downey Savings & Loan Ass'n v. Ohio Casualty Co.*, 189 Cal.App. 3d 1072, 1100-1101, 234 Cal. Rptr. 835 (1987), *cert. denied*, 108 S.Ct. 2023 (1988). The *only* exception to the cursory dismissal of Due Process challenges to punitive damages has been in the context of mass tort cases, which are *sui generis. In re School Asbestos Litig.*, 789 F.2d 996, 1002-05 (3rd Cir.) *cert. denied*, 479 U.S. 915 (1986); *Juzwin v. Amtorg Trading Corp.*, 705 F.Supp. 1053 (D.N.J. 1989). These decisions overlook the fact that neither *Day v. Woodworth* nor *Curtis Publ. Co. v. Butts* considered whether Due Process permits discretionary punitive damages, or whether Due Process requires procedural safeguards in a punitive damage case. Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures*, 69 Va. L. Rev. 269, 273-76 (1983).

the current state of the law, unless and until this Court acts.[3]

II

STANDARDLESS AWARDS OF PUNITIVE DAMAGES LEAD TO EXCESSIVE AWARDS WHOLLY DISPROPORTIONATE TO THE OFFENSE OR ACTUAL DAMAGES THAT GIVE RISE TO THEM

The punitive damages in this case are ten times the compensatory damages assessed against petitioners by the jury. The penalty assessed against these petitioners bears no reasonable relationship to their net worth. In his concurring opinion in *Rosener v. Sears, Roebuck & Co.*, 110 Cal.App.3d 740, 763, 168 Cal.Rptr. 237 (1980), Justice Elkington of the California Court of Appeal described contemporary punitive damages law as "an immovable and treacherous Sword of Damocles. For a misguided act or perhaps the misguided verdict of a jury any of us, denied the right to indemnification by insurance, is subject to the possible visitation of disaster." "[E]ven where a statute sets a range of possible civil damages that may be awarded to a private litigant, the Due Process Clause forbids damages awards that are 'grossly excessive,' *Waters-Pierce Oil Co. v. Texas*, 212 U.S. 86, 111 (1909), or 'so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable,' *St. Louis,*

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[3] An issue similar to that presented in this petition is presently before the Court in *Jordan v. Clayton Brokerage Co.*, 861 F.2d 172 (8th Cir. 1988), *cert. filed*, 57 U.S.L.W. 3696 (March 8, 1989) (No. 88-1483).

I. M. & S. R. Co. v. Williams, 251 U.S. 63, 66-67 (1919)." *Browning-Ferris, supra*, 109 S.Ct. at 2923 (Brennan & Marshall, JJ, concurring).

In instant case, Justice Elkington's Sword of Damocles fell and has visited financial disaster upon the Comoras. As the penalty for the jury's finding the Comoras had inadequate grounds for resisting the contractual aspects of this lawsuit, a multimillion verdict has been entered against them. This judgment imposes a windfall penalty far in excess of compensatory damages, emotional distress damages, interest, and attorneys' fees which more than make respondents whole for any losses caused by petitioners. If the case where punitive damages will wreak financial ruin on individuals is sought for consideration by this Court, then the instant case presents the due process issue in its severest context.

Petitioners submit that this case constitutes an appropriate vehicle for considering the Due Process issue on its merits. Both the California courts and the California Legislature have expressly declined to place any limits on the discretion of a civil jury in this type of case to impose punitive damages in whatever amount the jury thinks best. The standard jury instruction authorized by the California statute was given in this case. BAJI 14.71.

Petitioners present the paradigm case illustrative of the windfall which is occasioned by a standardless measure of punitive damages. Petitioners are individuals and the trustees of an inter vivos trust. The jury was never informed of their net worth and therefore could not make even a rough calculation of the size of a penalty sufficient to deter their wrongful conduct in the future. Without

financial condition evidence, under the standard jury instruction (BAJI 14.71), the jury had only contentless standards to guide its verdicts: the reprehensibility of petitioners' conduct and an admonition that the punitive damage award must bear a reasonable relationship to compensatory damages. The reprehensibility criterion was an invitation to give vent to passion and prejudice.

The effect of the jury verdicts was to declare a forfeiture of petitioners' entire ownership interest in the apartment building. Respondents sued for a half-interest in the building and have ended up with a judgment awarding them not only that half interest but all of the interest of petitioners and more.

III

STANDARDLESS AWARDS OF PUNITIVE DAMAGES DENY DUE PROCESS OF LAW TO DEFENDANTS

Nothing in California law warned petitioners that, by defending a lawsuit originally filed only for declaratory relief and an accounting, they were placing themselves at risk of a penalty that would spell financial disaster for them. Even if petitioners had intended to violate California's punitive damages statute, Cal. Civil Code section 3294, they would have had no idea of the penalty for doing so. The punishment would have been left to the wholly standardless discretion of the jury, as it was here. This "appears inconsistent with due process." *See United States v. Batchelder*, 442 U.S. 114, 123 (1979) (consequences of violating a criminal statute should be stated); *Giaccio v. Pennsylvania*, 382 U.S. 399, 403 (1966) (notwithstanding

court-imposed standards for application of statute, jurors must determine issue on their "notions of what the law should be," which violates Due Process). The law must enable citizens to conform their conduct to articulated requirements of the law and permit "meaningful judicial review." *Roberts v. United States Jaycees*, 468 U.S. 609, 629 (1984). The law of punitive damages in California does not permit either.

This case also confirms what is common knowledge – that "[a]wards of punitive damages are sky-rocketing." *Browning-Ferris*, 109 S.Ct. at 2924 (O'Connor & Stevens, JJ, concurring and dissenting); M. Peterson, S. Sarma, & M. Shanley, *Punitive Damages: Empirical Findings* at vii, 14, 42 (Rand 1987) (in California between 1980 and 1984, the median punitive damage award in bad faith actions was $336,000; the average was $1.6 million; in Cook County, Illinois, "[t]he total amount of money awarded as punitive damages increased by 800% . . . during the 1980's, even after adjusting for inflation").

The standardless instruction of juries on punitive damages exposes potential defendants to unconstrained sanctions based on their wealth. As one prominent plaintiff's attorney put it. "The wealth of the defendant should be the primary focal point of punitive damages." Levine, *Demonstrating and Preserving the Deterrent Effect of Punitive Damages in the Insurance Bad Faith Actions*, 13 U.S.F. L. Rev. 613, 634 (1979). "[P]unitive damages are imposed by juries guided by little more than an admonition to do what they think is best." *Browning-Ferris*, 109 S.Ct. at 2923 (Brennan & Marshall, JJ, concurring).

"[A]ppellate courts have no meaningful standard to apply in deciding whether to uphold punitive damages awards." Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures*, 69 Va. L. Rev. 269, 290 (1983); *see also* Owen, *Civil Punishment and the Public Good*, 56 U.S.C. L. Rev. 103, 121 (1982) ("[a]s the law of punitive damages has been developed and applied, much in both fairness and efficiency has been left aside"). The "law" of punitive damages encourages juries to "punish without regard to the true harm threatened by a defendant's conduct." American College of Trial Lawyers, *Report of the Task Force on Litigation Issues* 4 (1986); *see* Tort Policy Working Group, *An Update on the Liability Crisis* 47-52 (U.S. Dept. Justice 1987). Permitting juries to levy fines at will for the benefit of private plaintiffs under the "gentle rule that they not be excessive" does not advance a substantial state interest. *Gertz v. Robert Welch, Inc.* 418 U.S. 323, 349-50 (1974). Juries are invited to use "punitive damages . . . to punish unpopular defendants." *Int'l Brotherhood of Electrical Workers v. Foust*, 442 U.S. 42, 50-51 n.14 (1979).

The essence of due process of law is that it protects against governmental arbitrariness. *Daniels v. Williams*, 474 U.S. 327, 331 (1986). The present system of awarding punitive damages, in California as in most of the United States, is justice by whim and caprice rather than by the rule of law. Defendants in civil cases are subject to awards that need bear no relation to any harm defendants may have inflicted and that cannot be meaningfully reviewed by appellate courts. Vast and unpredictable awards by lay jurors who are admonished only to "do what they think is best" are the epitome of arbitrariness.

To hold that the Due Process Clause requires meaningful standards for punitive damages does not mean that the states will be put in a straitjacket on what they may permit by way of punitive damages. The Due Process Clause does not impose on the states any particular rule about punitive damages. It says only that there must be an articulation of some standard or standards by which punitive damages may be measured and against which any particular award may be reviewed.

CONCLUSION

For the foregoing reasons, petitioners urge this Court to grant certioriari to review the decision of the California Court of Appeal in this case.

Dated: January 18, 1990.

Respectfully submitted,

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Trustees of the Comora Family Trust

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

IRVIN RADELL, NANCY RADELL and DAVID RADELL, Plaintiffs and Respondents, v. MARGARET B. COMORA, EMANUEL M. COMORA, etc., et al., Defendants and Appellants.	B022114 consol. with B024866 (Super. Ct. Nos. WEC86104, C620793)
AILEEN COMORA, etc., et al., Plaintiffs and Appellants, v. IRVIN RADELL, NANCY RADELL, DAVID RADELL, et al., Defendants and Respondents.	(Filed Jun 28, 1989)

APPEAL from a judgment and orders of the Superior Court of Los Angeles County, Sara K. Radin, Jack M. Newman and Edward M. Ross, Judges. Affirmed.

Lipsig, Rosenfield & Leff, Robert G. Leff, Greines, Martin, Stein & Richland, Kent L. Richland and Barbara W. Ravitz for Defendants and Appellants.

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* Pursuant to California Rules of Court, rule 976.1, the Introduction, Factual Background and Parts IV and VII of this opinion are certified for publication.

Tarver and Webb, JeRome Edward Tarver and Dean Browning Webb for Plaintiffs and Appellants.

Stephen F. Rohde and Greg Victoroff for Respondents.

INTRODUCTION

In this consolidated matter, defendants Emanuel M. Comora and Margaret B. Comora, individually and as trustees of the Comora family trust, appeal from a judgment entered in favor of plaintiffs Irvin Radell, Nancy Radell and David Radell. Plaintiffs Aileen Comora, individually and as trustee of the Comora family trust, Madeleine Comora and Sian Comora appeal from an order of dismissal entered after the trial court sustained without leave to amend the demurrer of the Radells to their complaint. In addition, they appeal from an order imposing sanctions pursuant to Code of Civil Procedure section 128.5.

FACTUAL BACKGROUND[1]

Irvin and Nancy Radell are the stepfather and mother, respectively, of Margaret Comora. Emanuel Comora is her husband and David Radell is her half-brother. The Comoras have three adult daughters, Aileen, Madeleine and Sian.

In May 1970, Emanuel and Margaret Comora faced the foreclosure of a trust deed on real property they

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[1] Additional facts will appear as they are necessary to the resolution of the issues presented on appeal.

owned at 454 North Oakhurst Drive in Beverly Hills (the Oakhurst property). Emanuel Comora's name alone appeared on the deed to this property. A receiver was appointed and it appeared approximately $50,000 would be required to cure the default and discharge the receiver. The Comoras recently had lost their residence and another apartment building to foreclosure; consequently, they came to live with Irvin and Nancy Radell. The Radells agreed to provide the sums required to avoid foreclosure on the Oakhurst property. They entered into an agreement with California Federal Savings and Loan Association to this effect.

On October 19, 1970, the Radells and Emanuel Comora drew up and executed a property agreement. By its terms, in exchange for $30,000, Emanuel Comora granted 50 percent of his "ownerhsip, interests, and privileges" in the Oakhurst property to Irvin, Nancy and David Radell. In addition, David Radell and Emanuel Comora executed a management agreement which gave David Radell full authority to manage the property, negotiate leases, collect rents and make all disbursements. No "direct income payments" were to be made to Emanuel Comora until David Radell deemed them appropriate. David Radell was to receive a management fee of five percent of the monthly gross income. David Radell also received an apartment in which to live rent-free; he resided there until 1976, after which he received instead the cash equivalent of the rental value of the apartment, $1,100 per month. Pursuant to the management agreement, the tenants received notice on October 27, 1970 that David Radell was taking over management of the property.

On October 21, 1970, Emanuel Comora executed an installment note for $150,000 payable to Nancy Radell. The note bore interest at the rate of 10 percent per annum, payable monthly; annual payments of principal were to be made until 1975. The $150,000 represented the balance due on a note secured by a second deed of trust which Nancy Radell had acquired in 1968, as well as additional sums she had advanced over the years.

The parties amended their property agreement, executing a superseding written agreement on December 20, 1970. The amendment was precipitated largely by the Radells' investment of an additional $13,500 in the Oakhurst property since October 19, 1970.

The parties remained amicable and payments were made in accord with the terms of the October 19, 1970 property agreement until early in 1984. At that point, the Comoras repudiated the Radells' supposed ownership interest in the Oakhurst property, ceased to pay them any share of the profits from the building and excluded them from its management. The instant litigation ensued.

CONTENTIONS

I

The Comora defendants contend the trial court committed prejudicial error in refusing to permit defendant's expert to rebut surprise testimony from plaintiffs' expert concerning the genuineness of defendants' version of the December 20, 1970 agreement.

II

The Comora defendants further contend the trial court abused its discretion in precluding expert testimony on the question of whether the quitclaim deed and reconveyance purportedly signed by David Radell and witnessed by Nancy and Irvin Radell were or were not signed in blank.

III

The Comora defendants assert the trial court erred in excluding from evidence a copy of defendants' version of the December 20, 1970 property agreement which purportedly had been received as an exhibit in the 1973 Simonds interpleader action.

IV

The Comora defendants aver plaintiffs' cause of action brought under the aegis of *Seaman's Direct Buying Service, Inc. v. Standard Oil Co.* (1984) 36 Cal.3d 752 is fatally flawed and thus requires reversal.

V

The Comora defendants contend the award of damages to Nancy Radell for emotional distress is improper and must be reversed.

VI

The Comora defendants assert the statement of decision the trial court rendered in determining the equitable

issues remaining after the jury trial is erroneous in law and unsupported by the evidence.

VII

Finally, the Comora defendants contend the award of punitive damages is unconstitutional, in that it violates the Fourteenth and Eighth Amendments to the federal Constitution.

VIII

The Comora plaintiffs assert the trial court erred in dismissing their complaint after sustaining a demurrer without leave to amend and in imposing sanctions pursuant to Code of Civil Procedure section 128.5.

DISCUSSION

I

The Comora defendants contend the trial court committed prejudicial error in refusing to permit defendant's expert to rebut surprise testimony from plaintiffs' expert concerning the genuineness of defendants' version of the December 20, 1970 agreement. We disagree.

On June 25, 1985, plaintiffs duly notified defendants they would offer the expert testimony of Albert Lyter, a forensic chemist, concerning the genuineness of plaintiffs' and defendants' respective versions of the disputed December 20, 1970 agreement among the parties. Plaintiffs provided defendants with Mr. Lyter's report on July 3, 1985. Mr. Lyter's report indicated he performed tests

on the signature, typewriter and carbon inks used in preparing both pages of this challenged document. He came to four conclusions: (1) All signatures on the second page of both versions of the document were written with the same ink formula, one which was available in 1970 and remained available in 1985. (2) Both carbon copies of plaintiffs' version of the agreement used the same ink formula. (3) The carbon copies were reversed before Margaret Comora's name was typed on the second page of the document. (4) "The typewriter ribbon ink found on the second page of the original [of defendants' version] is different from the typewriter ribbon ink on the first page indicating that a different typewriter ribbon was used to type the first and second pages."

Mr. Lyter testified to these conclusions in detail and also testified, while he could not determine the time and date of the change in typewriter ribbons, there was nothing in the depth, color or evenness of the typewritten impressions on the first and second pages of defendants' version which indicated the ribbon was changed of necessity during the typing of the document. In addition, Mr. Lyter testified defendants' version of the document showed certain typing errors had been corrected by the "lift-off" correction method rather than by erasure or "whiting out" the errors and this innovation in the correction of typing errors was first introduced in 1973. Nothing in Mr. Lyter's report indicated he had conducted any examination of the documents for typing errors and the correction methods used. Defense counsel did not object to this testimony and conducted an extensive cross-examination of Mr. Lyter before ultimately moving to strike the testimony concerning "lift-off" correction on

the ground of surprise. Prior to interposing this motion, defense counsel questioned Mr. Lyter concerning the actual date on which this method of correction became available and introduced in evidence an article entitled "IBM Typewriter Survey 1973," with which counsel attempted to attack Mr. Lyter's conclusions.

It is axiomatic that to preserve on appeal the issue of an erroneous admission of evidence, a party must object to its admission on specifically stated grounds; the failure to do so waives any error. (*Estate of Silverstein* (1984) 159 Cal.App.3d 221, 225.) Such an objection must be timely (Evid. Code, § 353, subd. (a)), i.e., made "before the improper question is answered, or, if this is not feasible, by motion to strike *immediately* thereafter" (3 Witkin, Cal. Evidence (3d ed. 1986) Introduction of Evidence at Trial, § 2013, p. 1973, emphasis added). An untimely motion to strike is an ineffective substitute for timely objection. (3 Witkin, *op. cit. supra,* § 2025, p. 1987.) In the instant matter, it is clear defendants waived the question of the admissibility of Mr. Lyter's testimony concerning the presence of typographical errors and the method used for their correction; not only did defense counsel fail to object to questions which revealed an effort to explore an area beyond the scope of Mr. Lyter's report but he failed to move promptly to strike the objectionable answers.

Nonetheless, defendants were indeed surprised by this testimony. Surprise "denotes some condition or a situation in which a party to an action is unexpectedly placed to his detriment. The condition or situation must have been such that ordinary prudence on the part of the person claiming surprise could not have guarded against

and prevented it. Such party must not have been negligent in the circumstances. [Citations.]" (*Wade v. De Bernardi* (1970) 4 Cal.App.3d 967, 971; *South Santa Clara etc. Dist. v. Johnson* (1964) 231 Cal.App.2d 388, 406.) It is largely to prevent such surprise that each party is required not only to designate expert witnesses he or she intends to call but to disclose the substance of the facts and opinions to which the expert will testify, thereby providing reasonable notice of "the *specific areas of investigation* by the expert." (*Kennemur v. State of California* (1982) 133 Cal.App.3d 907, 919, emphasis added.) While a party need not disclose detailed facts underlying an expert's opinion (see, e.g., *Williams v. Volkswagenwerk Aktiengesellschaft* (1986) 180 Cal.App.3d 1244, 1258), there must be some revelation an expert has investigated a particular area and formed an opinion on it (see *Kennemur, supra,* at pp. 919-920). Where there has been no such revelation, the opposing party has been surprised.

Here, there was nothing in Mr. Lyter's report which indicated he had investigated the presence and method of correction of typographical errors. The entire emphasis of Mr. Lyter's expertise and investigation was on the chemical analysis of inks. Nothing alerted defendants to the need for inquiry into the area of typographical error correction methods or remotely suggested it would even be an issue in the case. Short of a complete reversal of a previously expressed opinion, it is difficult to conceive of any greater surprise defendants could have suffered.

Defendants' expert, Howard Riie, had confined his examination of the questioned documents to the signatures thereon, offering his opinion of their genuineness. Generally, where no prior notice has been given that an

opposing party's expert has investigated a particular area, the party is limited to using his expert's testimony in that area to impeach the testimony given by the opposition's expert. (Code Civ. Proc., § 2037.5[2]; *Kennemur v. State of California, supra,* 133 Cal.App.3d at p. 921.) Impeachment is limited to an attack on the veracity of a witness; the expression of a contrary opinion is not impeachment, while contradiction by showing the falsity of any matter upon which an opinion is based (i.e., an error in or the nonexistence of data) falls within the realm of impeachment. (*Id.,* at pp. 921-923; *Ellenberger v. Karr* (1982) 127 Cal. App.3d 423, 427.)

Mr. Lyter expressed the *opinion* certain typographical errors were corrected by the "lift-off" method; Mr. Rile could only have offered a contrary opinion on this point and that would not have been impeachment. In contrast, Mr. Lyter may have been mistaken in testifying the "lift-off" correction method first became available in 1973. It would indeed have fallen within the realm of impeachment had defendants offered evidence – in the form of Mr. Rile's testimony or otherwise – that the method in fact was available in 1970. However, nothing in the trial court's ruling precluded defendants from presenting such evidence.

All the same, defendants assert, in view of this surprise they were entitled to have Mr. Rile reexamine the document in question and express an opinion contrary to that of Mr. Lyter. While it may have been within the trial

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[2] Code of Civil Procedure sections 2037 through 2037.9 were repealed and replaced by section 2034, effective July 1, 1987. (Stats. 1986, ch. 1336, §§ 2, 3.)

court's discretion to permit such a digression (Code Civ. Proc., § 2037.6; see, e.g., *McLaughlin v. Sikorsky Aircraft* (1983) 148 Cal.App.3d 203, 210), it is not clear from the instant record the court so abused its discretion as to require reversal.

First, since Mr. Rile had not examined the body of the challenged document and his expertise in this area was not established, a lengthy delay in the trial might have been necessary. More importantly, where a party has been surprised by testimony, reversal is not warranted unless the complaining party has made a showing he or she could have presented contradictory evidence. (*Wade v. De Bernardi, supra,* 4 Cal.App.3d at p. 972.) Following the verdict in this case, defendants moved for a new trial. One ground for the motion was the trial court's refusal to permit Mr. Rile to examine the challenged document and express an opinion as to whether the "lift-off" method of correction had in fact been utilized. However, defendants made no showing in support of their motion that Mr. Rile or any other expert in fact could have testified the "lift-off" correction method was *not* utilized. Neither have they presented such evidence before this court. In the absence of such a showing, it would appear defendants have failed to carry the burden of demonstrating prejudice from any abuse of discretion which may have occurred.

Finally, there is no other basis from which to infer defendants have suffered any prejudice. All parties agreed to the genuineness of an agreement they signed on June 30, 1981. This agreement provides that record title to the Oakhurst property is to be transferred from Emanuel Comora to Margaret Comora and she is to be

substituted for Emanuel Comora in all previous *partnership agreements*. It is inconceivable defendants would have signed the June 30, 1981 agreement if there was not in fact a partnership agreement among the parties concerning this property. Moreover, all parties agreed plaintiffs and defendants *all* executed a separate settlement agreement with the first mortgagee, California Federal Savings and Loan Association, in October 1970 – a step which would have been unnecessary had plaintiffs *not* held an ownership interest in the property.

Further, the parties regularly filed federal and state partnership income information returns with respect to this property beginning with the 1971 tax year and concluding with the 1983 tax year. Neither accountant who prepared these returns ever was informed no partnership in fact existed and each believed it in fact existed. In 1982, Emanuel Comora asked the successor accountant, Jacob Spiegel, what steps were necessary to terminate the partnership while the original accountant, Samuel Pearlman, was shown a copy of the October 19, 1970 property agreement at least. Indeed, this agreement was revised in December 1970 at the *suggestion* of Mr. Pearlman, who was *defendants'* accountant, to avoid the necessity of filing a partnership information return for the final two months of 1970 and to reflect the true extent of plaintiffs' capital contribution which had increased from $30,000 to $43,500. According to defendants' expert, William Klein, either the partnership returns indeed reflected some form of co-ownership or they had been filed contrary to tax law.

In addition, Attorney Arthur Alef met with Emanuel Comora in January 1983 and subsequently with all the parties to discuss estate planning which specifically

addressed the parties' interests in the Oakhurst property. At no time did defendants inform Attorney Alef that there was no partnership affording plaintiffs an ownership interest in this property. In fact, Emanuel Comora freely acknowledged the existence of a partnership, but asserted several reasons for his expressed reluctance to change record title to reflect the true form of ownership.

In view of the foregoing evidence, there simply is no reasonable probability defendants would have achieved a more favorable result had Mr. Rile been permitted to express an opinion as to whether "lift-off" corrections had been made on defendants' version of the December 20, 1970 agreement. Accordingly, any possible abuse of discretion does not warrant reversal. (Code Civ. Proc., § 475; *Pool v. City of Oakland* (1986) 42 Cal.3d 1051, 1069.)[3]

II

The Comora defendants further contend the trial court abused its discretion in precluding expert testimony

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[3] Defendants claim juror affidavits which they submitted in support of their motion for new trial establish they were indeed prejudiced. Plaintiffs objected to the admissibility of these affidavits on several grounds, including that they contained inadmissible hearsay and were conclusional. Clearly, all plaintiffs' objections were well taken; the declarations thus were not properly before the trial court and are not properly before this court. *Whitfield v. Debrincat* (1937) 18 Cal.App.2d 730, 739 does not hold to the contrary, but simply states each juror's expression of the weight he or she individually gave to certain testimony *may* be considered on a motion for new trial. The declarations at issue here do not fit that criterion.

on the question of whether the quitclaim and reconveyance deeds purportedly signed by David Radell and witnessed by Nancy and Irvin Radell were or were not signed in blank. Again, we disagree.

A demand made pursuant to Code of Civil Procedure section 2037 requires a mutual exchange of lists of expert witnesses and an exchange of identified experts' discoverable reports and other writings. The date of the exchange is to be 20 days after the date of the demand or 50 days "prior to the *date set* for *commencement* of the trial, whichever is later." (Code Civ. Proc., § 2037.1, emphasis added.) The affected parties have a duty to make such a mutual exchange not later than the date of exchange defined above. (Code Civ. Proc., § 2037.2.) The witness list must provide not only the *name* of the expert witness to be called but his or her business address, a statement of qualifications and "the general substance of the testimony which the witness is expected to give." (Code Civ. Proc., § 2037.3.) In addition, if the demand requires it, any discoverable reports or writings must be produced. (*Ibid.*)

A party later may designate additional experts if certain requirements are met. "A party who is required to exchange lists of witnesses shall diligently give notice to the parties *upon whom* his or her *list is served* if, *after service* of it, he or she determines to call an expert witness *not included in it*, and a party shall make available for deposition such expert witnesses as he or she has determined to call and shall immediately make available for inspection and copying all of such expert witness's discoverable reports and writings." (Code Civ. Proc., § 2037.4, emphasis added.)

Plaintiffs complied with the forgoing provisions, providing defendants with a list of their expert witnesses on June 5, 1985, the latest "date of exchange," i.e., 50 days before the date set for the commencement of the trial. In addition, plaintiffs later designated Mr. Lyter on June-20, 1985, as soon as they knew his services had been engaged, produced his report immediately upon its availability and offered to make him available for deposition.

Defendants did not comply: they served upon plaintiffs no list of expert witnesses whatsover on or before June 5, 1985. Fifteen days later, on June 20, 1985, defendants served a document erroneously titled *"Revised* List of Expert Witnesses" (emphasis added) which did not itself designate Mr. Rile, but erroneously referred to him as a "previously designated" expert. It did not provide Mr. Rile's business address, state his qualifications, state the general substance of the testimony he was expected to give or produce any discoverable writings. This was ineffective to serve as compliance with Code of Civil Procedure sections 2037.2 and 2037.3. Clearly, section 2037.4 permits the later designation of additional expert witnesses *only* when a mutual exchange earlier has been made in a timely fashion; it provides no substitute for compliance with section 2037.2 itself.

Generally, the failure to timely designate an expert witness or to state the substance of the expected testimony precludes a party from calling that witness. (Code Civ. Proc., § 2037.5; *Gallo v. Peninsula Hospital* (1985) 164 Cal.App.3d 899, 903.) Relief from such omissions will be granted only where the noncomplying party has made a good faith effort to comply with Code of Civil Procedure sections 2037.2 and 2037.3 and has made an adequate

showing of excuse and a lack of prejudice to the objecting party. (*Ibid.*) An adequate showing of excuse requires evidence either that the noncomplying party would not have determined to call this witness in the exercise of reasonable diligence or failed to do so through mistake, inadvertence, surprise or excusable neglect. (Code Civ. Proc., § 2037.6, subd. (a).) In determining this issue, the court *must* consider the extent to which the opposing party has relied on what has been produced. (*Id.*, subd. (b).)

Plaintiffs objected to defendants' "revised list" of expert witnesses and a hearing accordingly was held on July 11, 1985. During the hearing, plaintiffs reiterated their willingness to make Mr. Lyter available for deposition and stated a willingness to accept the expert witnesses challenged by exception so long as their reports were produced forthwith. At that point, the original date set for trial of July 25, 1985 had been revised to July 31, 1985. Accordingly, the court ordered defendants to produce all discoverable reports from these expert witnesses by July 19, 1985 or eschew calling these witnesses at trial.

The reason for the court's limitation is clear: at the time, a party's right to compel discovery terminated 30 days before the date *set* for the trial of the case and the right to have motions concerning discovery heard terminated 10 days prior to the date set for trial in the case of an expert witness identified pursuant to Code of Civil Procedure section 2037. (Cal. Rules of Court, rule 333 [repealed eff. July 1, 1987].) Hence, no matter how long the case trailed before actually coming to trial, plaintiffs' right to conduct discovery pertaining to expert witnesses would terminate on July 21, 1985; thereafter, plaintiffs

would be entirely at the mercy of defendants' willingness voluntarily to permit discovery.

On August 27, 1985, long after plaintiffs lost their right to have discovery matters heard, defendants served plaintiffs with a report from Mr. Rile dated August 19, 1985. This report proffered Mr. Rile's opinion as to whether the two challenged documents could have been signed in blank or the body could have been typed after the signature lines were typed and signed. This report forms the basis of the testimony which the court excluded.

During trial, plaintiffs moved to exclude Mr. Rile from testifying at all on the ground of defendants' failure to comply with Code of Civil Procedure sections 2037.2 and 2037.3. Defendants offered as evidence of their good faith efforts and excusable mistake or neglect only defense counsel's belief that the use of a report from Mr. Rile, dated August 16, 1984, in support of a motion for summary judgment made at that time was an adequate designation. The trial court concluded plaintiffs were sufficiently aware of Mr. Rile's existence, the opinion expressed in the August 16, 1984 report and defendants' intent to produce him as a witness to outweigh any prejudice they may have suffered from defendants' procedural failures. However, the trial court further concluded defendants were bound by the order of July 11, 1985, which required the submission of expert reports by July 19, 1985, and thus were precluded from producing testimony relating to the subject matter of the August 19, 1985 report.

Code of Civil Procedure section 2037.6 confers discretion upon the trial court in determining whether and on what terms to permit a party to call an expert witness who has not timely or properly been so designated. The discretion thus afforded the lower court is not capricious or arbitrary, but impartial; it is " ' "guided and controlled in its exercise by fixed legal principles. It is not a mental discretion, to be exercised *ex gratia*, but a legal discretion, to be exercised in conformity with the spirit of the law and in a manner to subserve and not to impede or defeat the ends of substantial justice." ' " (*Carroll v. Abbot Laboratories, Inc.* (1982) 32 Cal.3d 892, 898, quoting from *Benjamin v. Dalmo Mfg. Co.* (1948) 31 Cal.2d 523, 526.) Thus, in general terms, "[t]he appropriate test for abuse of discretion is whether the [lower] court exceeded the bounds of reason." (*Shamblin v. Brattain* (1988) 44 Cal.3d 474, 478.)

An abuse of discretion must be affirmatively established; this court may not substitute its own judgment for that of the lower court. (*In re Marriage of Gonzalez* (1976) 57 Cal.App.3d 736, 749; *Smith v. Smith* (1969) 1 Cal.App.3d 952, 958.) Hence, if two or more inferences reasonably may be deduced from the facts, this court must defer to those accepted by the lower court. (*Shamblin v. Brattain, supra*, 44 Cal.3d at pp. 478-479.)

Upon consideration of the foregoing principles, it does not appear the trial court abused its discretion in excluding any testimony related to the contents of Mr. Rile's August 19, 1985 report. The following evidence and inferences reasonably drawn therefrom supports the court's exercise of its discretion: When defendants were required to provide the reports of other experts by July 19, 1985, they were aware there was a perceived need for

an additional report from Mr. Rile. Presumably, defense counsel also was aware of rule 333 of the California Rules of Court and thus knew plaintiffs had very little time remaining in which to conduct discovery proceedings. While reports from Mr. Rile were not expressly the subject of the July 11, 1985 order, defense counsel surely understood the basis for the time limitation. Yet defense counsel made no effort to provide Mr. Rile's additional report by July 19, to seek further relief from the court or to reach a voluntary discovery agreement with plaintiffs. Instead, defendants waited nearly a full month *after* the date set for trial before serving plaintiffs with this report. They offered no excuse for doing so.

Hence, the trial court reasonably could have concluded there was no basis for granting defendants relief with respect to the contents of this belated report. Clearly, there is an evidentiary and inferential basis for the trial court's ruling; hence, it does not amount to an abuse of discretion. (*Shamblin v. Brattain, supra,* 44 Cal.3d at pp. 478-479.)

Moreover, even if the trial court may be viewed as having abused its discretion in excluding Mr. Rile from testifying to whether the documents could have been signed in blank or the body could have been typed after the signature lines were typed and signed, defendants have suffered no prejudice. Nancy Radell did testify she periodically signed blank sheets of paper at the request of her daughter, defendant Margaret Comora, who would indicate she needed a certain document for business or legal purposes but had no time to prepare it at the moment. However, there was no similar testimony concerning the signatures of Irvin Radell and David Radell.

In contrast, there was a wealth of evidence the signatures of all three had been forged in the past. According to Nancy Radell, Margaret Comora often signed Mrs. Radell's name to checks and other documents; over time, she became so expert at doing so that Mrs. Radell often could not distinguish between her genuine signature and Mrs. Comora's replica. Margaret Comora did not deny this. In addition, Nancy Radell presented credible evidence she was out of the country when one document purportedly bearing her signature was signed and testified her signature and that of Irvin Radell, as they appeared on a number of documents, were not genuine. David Radell presented similar evidence.

In addition, David Radell unequivocally established he was out of the state and country for several days preceding and following the date appearing on the quitclaim and reconveyance deeds he purportedly signed in October 1982. It is *these* two documents which Mr. Rile's excluded testimony would have addressed. Both defendants testified unequivocally that these documents were indeed signed by all three plaintiffs in defendants' presence on October 30, 1982, the date the documents bear. *After* David Radell established his unavailability on that date, Emanuel Comora recanted that portion of his testimony and testified he now recalled David Radell had signed the documents before his departure on October 26 and Nancy and Irvin Radell had added their signatures as witnesses on October 30. However, Margaret Comora never retreated from her original position.

Moreover, although Mr. Rile offered his expert opinion the signatures on these documents were genuine, there was a sound basis upon which the jury could have

rejected that opinion. Enlargements of the signatures on these two documents and of the exemplars Mr. Rile used for his comparison reveal clear differences between the exemplars and the signatures on the documents. These are sufficiently discernible to the untrained eye to raise doubts as to the genuineness of the signatures, yet Mr. Rile dismissed then [sic] as "insignificant" variations from the "norm."

In sum, there was precious little evidence from which a jury might have inferred the documents had been signed in blank, but a wealth of evidence supporting the conclusion the signatures were not genuine. Given the state of the record, it is not reasonably probable the excluded testimony resulted in any prejudice to defendants. Accordingly, any possible abuse of discretion does not warrant reversal. (Code Civ. Proc., § 475; *Pool v. City of Oakland, supra,* 42 Cal.3d at p. 1069.)

III

The Comora defendants assert the trial court erred in excluding from evidence a copy of defendants' version of the December 20, 1970 property agreement which purportedly had been received as an exhibit in the 1973 Simonds interpleader action. We perceive no merit in the assertion.

In general, "[n]o evidence other than the original of a writing is admissible to prove the content of a writing." (Evid. Code, § 1500.) However, "[a] duplicate is admissible to the same extent as an original unless (a) a genuine question is raised as to the authenticity of the original or (b) in the circumstances it would be unfair to admit the duplicate in lieu of the original." (Evid. Code. § 1511.)

Defendants offered as exhibit 546-N-1 a photocopy of their version of the December 20, 1970 property agreement allegedly bearing an exhibit tag from the trial of the 1973 Simonds action. Plaintiffs objected on the ground the photocopy failed to comply with the Best Evidence Rule (Evid. Code, § 1500) and their objection was sustained. Two weeks later, defense counsel represented to the court that he had had the exhibit certified; thereafter, he offered as exhibit 716 purportedly "certified" copies of all 17 exhibits introduced at the trial of the Simonds action, including defendants' version of the December 20, 1970 agreement ("exhibit 7"). Each page of exhibit 716 bears a certification stamp signed by Sonia Sayson which reads on "exhibit 7": "I certify this to be a true and correct copy of the original Exhibit 7 on file in this office." Plaintiffs questioned the authenticity of exhibit 716 and particularly "exhibit 7" included therein; consequently, the court held an evidentiary hearing pursuant to Evidence Code section 403, subdivision (a), outside the presence of the jury.

The authenticity of a writing is a preliminary fact which presents a mixed question of fact and law; the proffered document must be admitted in evidence if the proponent has made *any* showing sufficient to sustain a finding of the existence of the preliminary fact. (*Id.*, subd. (a)(3); 3 Witkin, *op. cit. supra*, § 1716, p. 1675.) Thus, the proponent has "the burden of producing evidence as to the existence of" this preliminary fact. (Evid. Code, § 403, subd. (a).) The trial court may not weigh evidence and resolve conflicts against admissibility of the writing, but "can only exclude the proffered evidence if the showing of preliminary facts is too weak to support a favorable

determination [of the preliminary factual question] by the jury." (3 Witkin, *op. cit. supra*, § 1716, p. 1675.) In other words, the writing cannot be excluded if there is sufficient evidence to support its authenticity. (*Id.*, § 1720, p. 1678.) The sufficiency of the evidence is a question of law confided to the trial court's discretion; it will not be disturbed on appeal in the absence of an abuse of discretion. (*Cotton v. Hudson* (1941) 42 Cal.App.2d 812, 815.)

Sonia Sayson, supervisor of the records and information section of the Los Angeles Municipal Court, testified she never found either *original* exhibits from the 1973 Simonds trial nor any *copies* thereof among the municipal court files. Emanuel Comora appeared at her office on February 7, 1986, during the instant trial, with photocopies of what he *said* were the 17 exhibits from the Simonds trial. Without comparing these copies with anything in the court files, as is required for proper certification, Ms. Sayson stamped and signed the "certifications" on the instructions of her supervisor, who concluded the exhibit tags on the copies looked genuine. Ms. Sayson's supervisor, Rene Dominguez, had not compared the copies bearing the certifications with the original exhibits or any copies of exhibits kept and maintained by the municipal court since 1973. He *assumed*, from the presence of exhibit labels, these were copies of documents on file. David Radell testified without contradiction that he was present during the 1973 Simonds trial and the document now purported to have been "exhibit 7" in that trial was *not* introduced in evidence at any time during the proceeding. Defendants offered no evidence of authenticity other than the purported "certifications."

From the foregoing evidence, it is clear defendants simply failed to carry their burden of producing evidence the "certified" copies were authentic. There is *no* evidence sufficient to sustain a jury finding to that effect. Assuming arguendo the literal *fact* of certification may be viewed as creating a rebuttable presumption of authenticity, the evidence presented unequivocally rebutted any such presumption. Given the denial "exhibit 7" was what it purported to be and the explanation of the lax and unverified manner in which certification was given, any presumption reasonably may be considered to have been dispelled. (Cf. *LeGrand v. Yellow Cab Co.* (1970) 8 Cal.App.3d 125, 132-133; accord, *Wheeler v. St. Joseph Hospital* (1976) 63 Cal.App.3d 345, 369.) Hence, the record amply supports the trial court's ruling and will not be disturbed on appeal. (*Cotton v. Hudson, supra,* 42 Cal.App.2d at p. 815.)

Nonetheless, defendants argue the Best Evidence Rule is inapplicable, in that the certified copy of the Simonds "exhibit 7" was not offered "to prove the content of a writing." (Evid. Code, § 1500; *People v. Marcus* (1973) 31 Cal.App.3d 367, 371.) However, content is in issue if there is any controversy as to the content of the original of the writing. (*Ibid.*) Here, there clearly was a controversy as to the content both of the original "exhibit 7" at the Simonds trial and of the original writing itself ("exhibit 7" purportedly was a photocopy of the original writing).

Moreover, if content was not at issue, the document was irrelevant and thus inadmissible on that ground. (Evid. Code, § 350.) The sole purpose in offering this evidence was to establish that defendants' version of the

December 20, 1970 agreement was genuine and indeed had been in evidence in a separate proceedings in 1973; it had no tendency in reason to prove that fact (Evid. Code, § 210) unless the *content* of "exhibit 7" was that purportedly reflected in the certified photocopy. Where, as here, the relevance of proffered evidence depends on the existence of a preliminary fact (Evid. Code, § 403, subd. (a)(1)), it must be excluded unless the proponent carries the burden of establishing its relevance (*Pacific Gas & Elec. Co. v. Hacienda Mobile Home Park* (1975) 45 Cal.App.3d 519, 530-531).

Defendants further argue they conclusively established admissibility pursuant to Evidence Code sections 1501 and 1502, which deal respectively with lost or destroyed writings and those under the control of an opponent. Defendants did produce ample evidence the original "exhibit 7" was lost (*Kenniff v. Caulfield* (1903) 140 Cal. 34, 41; *Cheek v. Whiston* (1958) 159 Cal.App.2d 472, 477), but this begs the question. It is fundamental that even a writing which comes within an exception to the Best Evidence Rule must be authenticated to be admissible. (Evid. Code, § 1401.) Authentication requires "the introduction of evidence sufficient to sustain a finding that it is the writing that the proponent of the evidence claims it is" or otherwise establishing such fact. (Evid. Code, § 1400.) As noted *ante*, defendants failed to produce such evidence.

IV

The Comora defendants aver plaintiffs' cause of action brought under the aegis of *Seaman's Direct Buying*

Service, Inc. v. Standard Oil Co., supra, 36 Cal.3d 752 is fatally flawed and thus requires reversal. The averment lacks merit.

Seaman's addresses the problem of applying the covenant of good faith and fair dealing implied in every contract to permit the bringing of a tort cause of action in the context of a commercial contract not accompanied by a "special relationship." The California Supreme Court notes: "In [ordinary commercial] contracts, it may be difficult to distinguish between breach of the covenant and breach of contract, and there is the risk that interjecting tort remedies will intrude upon the expectations of the parties. This is not to say that tort remedies have no place in such a commercial context, but that it is wise to proceed with caution in determining their scope and application." (36 Cal.3d at p. 769.)

Seaman's finds it unnecessary to resolve the problem under the facts, however, in that "a party to a contract may incur tort damages when, in addition to breaching the contract, it seeks to shield itself from liability by denying, in bad faith and without probable cause, that the contract exists." (*Ibid.*) In that instance, *Seaman's* concludes, it is not even necessary to rely on the implied covenant of good faith and fair dealing.

"It has been held that a party to a contract may be subject to tort liability, including punitive damages, if he coerces the other party to pay more than is due under the contract terms through the threat of a lawsuit, made ' "without probable cause and with no belief in the existence of the cause of action." ' [Citation.] There is little difference, in principle, between a contracting party

obtaining excess payment in such manner, and a contracting party seeking to avoid all liability on a meritorious contract claim by adopting a 'stonewall' position ('see you in court') without probable cause and with no belief in the existence of a defense. Such conduct goes beyond the mere breach of contract. It offends accepted notions of business ethics. [Citation.] Acceptance of tort remedies in such a situation is not likely to intrude upon the bargaining relationship or upset reasonable expectations of the contracting parties." (*Seaman's, supra,* 36 Cal.3d at pp. 769-770.)

Plaintiffs' second amended complaint was filed on July 24, 1984, approximately one month before the California Supreme Court issued *Seaman's*. The complaint labels the causes of action set forth as declaratory relief, partition, accounting, dissolution of a partnership and fraud. It alleges the subject of the action is a written partnership agreement, subsequently amended in writing, which concerns the Oakhurst property. It further alleges the parties are the partners; David Radell holds a 25 percent interest, Irvin and Nancy Radell hold a 25 percent interest and defendants hold a 50 percent interest in the partnership.

In addition, the complaint alleges the parties all treated each other as partners from and after October 19, 1970, regularly filing federal and state partnership tax returns, but defendants, in January, February and March 1984, "repudiated the partnership and denied [plaintiffs'] ownership interest in the Property"; one day after the action originally was served on defendant Margaret Comora, defendants transferred bank accounts belonging to the property without plaintiffs' knowledge or consent,

attempted to terminate the post office box used for the property, ceased to distribute to plaintiffs their share of net monthly income, ceased to pay David Radell $1,100 per month in lieu of his use of an apartment on the property and "exluded [plaintiffs] from the management of the Property, all in direct repudiation of the [partnership] Agreements of the parties as hereinafter alleged."

The complaint also alleges plaintiffs have an interest in the property as partners and coowners, but since at least March 23, 1984, defendants have "usurped complete control and management of the property" from plaintiffs and have been "using the income, rents and profits derived from the Property for their sole and exclusive benefit." Finally, it alleges defendants submitted to the court a "reconveyance deed" and a "quitclaim deed," each dated October 30, 1982, purportedly signed by plaintiffs, which are forgeries.

On November 4, 1984, plaintiffs' counsel brought the *Seaman's* case to defense counsel's attention by certified letter. Plaintiffs' counsel quoted from *Seaman's* and notified defendants the "tort aspects of the Second Amended Complaint contemplate this theory in seeking punitive damages for the use of forged documents and other fraudulent conduct in an effort to deny the existence of a partnership between plaintiffs and defendants." However, plaintiffs did not amend the second amended complaint expressly to state a cause of action under *Seaman's*. Defendants objected to this failure to amend, on the ground it prevented them from demurring, but plaintiffs' counsel maintained the existing allegations, i.e., that defendants engaged in fraudulent conduct to repudiate the partnership and deny plaintiffs' ownership interest in

the property, adequately covered the theory – posing "a virtual classic example of bad faith denial of a contract without probable cause."

On the eve of trial, the trial court denied defendants' motion to exclude the *Seaman's* theory, ruling "[i]f the evidence is presented to support the theory of tort liability on the same general facts . . . as pleaded and which brings the case under . . . the *Seaman's* [theory], then the court will allow plaintiffs to amend to conform to proof." At the conclusion of the jury trial, the court allowed plaintiffs to conform the second amended complaint to proof by adding a sixth cause of action for tortious repudiation of the partnership agreement.

Plaintiffs incorporated the allegations set forth above and, in addition, alleged defendants "have wrongfully repudiated liability to plaintiffs under the aforementioned agreements and under the notes and Deeds of Trust . . . by asserting groundless defenses in bad faith and without probable cause and by offering false evidence, in violation of the covenant of good faith and fair dealing and in violation of defendants' fiduciary duty to plaintiffs." It is the latter, newly stated, allegations which defendants view as fatally flawed. They take the position that *Seaman's* does not permit a cause of action for repudiation, i.e., denial of *liability* under a contract, but only for denial of its existence.

Currently, there is a split of authority in the interpretation of *Seaman's* with respect to this point. *Quigley v. Pet, Inc.* (1984) 162 Cal.App.3d 877 involves a situation where the defendant declared a contract rescinded, based upon an alleged misrepresentation made by the plaintiff,

demanded reimbursement for overpayment and threatened the plaintiff with a lawsuit. (At. p. 890.) *Quigley* notes *Seaman's* had not required examination of conduct in the *performance* of a contract, but only asked whether a contract existed. (*Ibid.*)

The court finds the distinction important: "General and punitive damages may be appropriate judicial sanctions for those who in bad faith deny the contract itself, but may be much less well chosen for those whose fault lies only in having inadequate grounds to challenge contract terms. . . . Not all contractual facts are crystal clear. The dispute may be to the fact of a meeting of the minds in the first place, or it may be over the meaning of the words used. Inappropriate reliance may be placed on unenforceable oral 'modifications' or 'supplements.' . . . There may be uninformed positions taken, energized by emotions and self interest." (*Quigley, supra,* 162 Cal.App.3d at p. 892.) This is much the same position taken in *Elxsi v. Kukje America Corp.* (N.D.Cal. 1987) 672 F.Supp. 1294, 1297-1298. (Accord, *Nissho-Iwai Co. v. Occidental Crude Sales, Inc.* (5th Cir. 1988) 848 F.2d 613, 622.)

On the other hand, *Multiplex Ins. Agency, Inc. v. California Life Ins. Co.* (1987) 189 Cal.App.3d 925 takes a different approach. *Multiplex* relies on the following: "*Seaman's* recognized that stonewalling 'goes beyond the mere breach of contract. It offends accepted notions of business ethics. [Citation.] Acceptance of tort remedies in such a situation is not likely to intrude upon the bargaining relationship or upset reasonable expectations of the contracting parties.' [Citation.]" (At p. 934.) As a consequence, where a defendant has "denied any liability 'in bad faith and without probable cause, that the contract

exists' or denied liability 'without probable cause and with no belief in the existence of a defense [stonewalling]' . . . no special relationship is necessary. [Citation.]" (*Id.*, at p. 939, citation omitted.)

It has long been recognized in California that a partner may state a tort cause of action against another partner where the offending partner "excludes the other, repudiates the very existence of the partnership and converts all of the partnership assets." (*Gherman v. Colburn* (1977) 72 Cal.App.3d 544, 557-558, 561, 562.) *Gherman* concludes statutory and case authority use the term "breach of contract" "in the sense that there has been a *repudiation* of the basic concept – a denial of the very existence of a partnership or joint venture relationship *in any form* or *at any time* and a conversion of the partnership assets. It is regrettable that the words 'breach' and 'repudiation' are sometimes used interchangeably, but there is a technical difference. According to Black's Law Dictionary (rev. 4th ed. 1968), a 'breach of contract' is the 'failure, without legal excuse, to perform any promise which forms the whole or part of a contract' whereas according to the same authority 'repudiation' means the 'rejection; disclaimer, renunciation; . . . of a duty or relation.' " (*Id.*, at pp. 563-564, emphasis original in part.)

Contrary to defendants' assertion, *Gherman* does not stand for the proposition that a plaintiff must elect between tort, breach of contract and dissolution remedies. While *Gherman* states "the victim at least has alternative remedies" (*id.*, at p. 564, fn omitted), the court notes the remedies actually are cumulative pursuant to Corporations Code section 15038 (*ibid.*, fn 12). Moreover, although *Gherman* does not expressly say so, implicit in

its holding is a recognition that the repudiating partner acts in bad faith and without any conceivable justification for his action. In other words, in the context of a partnership, California law long has anticipated *Seaman's*.

In this context, plaintiffs' allegations that defendants "repudiated the partnership and denied [plaintiffs'] ownership interest in the Property," transferred bank accounts belonging to the property without plaintiffs' knowledge or consent, attempted to terminate the post office box used for the property, ceased to distribute to plaintiffs their share of net monthly income, ceased to pay David Radell $1,100 per month in lieu of his use of an apartment on the property and "excluded [plaintiffs] from the management of the Property, all in direct repudiation of the [partnership] Agreements of the parties," and "usurped complete control and management of the Property" from plaintiffs, "using the income, rents and profits derived from the Property for their sole and exclusive benefit" serve the same purpose as a statement defendants denied the existence of the partnership and partnership agreement. Of particular pertinence is the allegation defendants performed acts "in direct repudiation of the [partnership] *Agreements* of the parties." (Emphasis added.) As *Gherman* notes, "repudiation" in this context means "a denial of the very existence of [the thing] *in any form* or *at any time*." (72 Cal.App.3d at p. 563, emphasis added.) Clearly, the import of the allegation actually made and that of the allegation which could have been made are the same.

The allegation that defendants submitted to the court in support of their denials a "reconveyance deed" and a

"quitclaim deed," each dated October 30, 1982, purportedly signed by plaintiffs, which are forgeries, serves the same purpose as an express allegation defendants acted in bad faith and without probable cause. If the original allegations are not sufficient in themselves, then the added allegation that defendants acted wrongfully, in bad faith and without probable cause, "by offering false evidence" reasonably may be viewed as curing any remaining defect. Hence, it is unnecessary to determine whether the balance of the added allegations state a cause of action under *Seaman's*.

Defendants argue the complaint at issue here nonetheless is fatally flawed, in that plaintiffs do not and cannot allege defendants deny the existence of *any* contract. Rather, in defendants' view, the only dispute is in how the agreement of the parties is to be interpreted and which version is the correct one. The argument is specious for two reasons. First, *all* litigation which stems from the purported existence of a contract involves a *particular* contract and plaintiffs do indeed allege defendants denied the existence of a *particular* contract. Second, from the face of the complaint it is not in any manner apparent the parties simply have a dispute over interpretation or which version is correct; thus, from a standpoint of whether plaintiffs stated a cause of action under *Seaman's*, the assertion is irrelevant.

Defendants would construe *Seaman's* as meaning a party may escape tortious liability – even if he denies the existence of the *written contract* the plaintiff says exists – so long as he acknowledges he or she has *a* written contract with the plaintiff, albeit one with vastly different terms. In the context of the facts presented here, we

cannot agree. *Seaman's* expressly refers to a denial, "in bad faith and without probable cause, that *the* contract exists." (36 Cal.3d at p. 769, emphasis added.) When the parties all agree the contract is a written one, the only common sense meaning to be given *Seaman's* is that denying the existence of *the contract the plaintiff proffers* as the written agreement of the parties is the type of denial the court had in mind. It is unthinkable that a defendant could escape tort liability upon fabricating a false version of a genuine contract simply because he or she had the presence of mind *not* to deny the existence of *any* form of contract. It is no less egregious to assert falsely that plaintiff's version of the parties' written agreement is not genuine than it is to deny altogether that *any* agreement exists.

Not only is defendants' construction of *Seaman's* unreasonably narrow, but defendants' characterization of the circumstances is inaccurate. It is clear the instant dispute did not result from ambiguous contract language which reasonably might be given two differing interpretations. Both the October 19, 1970 agreement and the December 20, 1970 agreement (plaintiffs' version) state unequivocally: "In return for [a sum certain in] cash, I, Dr. Emanuel M. Comora, do hereby grant fifty percent (50%) of my ownership, interest and privileges in the building and grounds located at 454 North Oakhurst . . . to Nancy, Irvin and David R. Radell. [¶] I, Dr. Emanuel M. Comora, do hereby agree that Nancy, Irvin and David R. Radell are to receive fifty percent (50%) of the net monthly income from the building and grounds. . . . If said property is sold, Nancy, Irvin and David R. Radell are to be paid fifty percent (50%) of all

monies assigned to my account in escrow as a result of said sale." *No* reasonable person could read those words and reach any conclusion other than that it created some form of coownership and profit sharing – if not a partnership, then a joint venture (it does not matter which).[4]

More importantly, this was not in any manner a case where the parties all agreed a certain written document was executed, but differed in their interpretations of its language. Concededly, in those circumstances, there would not be a denial of the existence of the contract. But here, defendants absolutely denied executing the written agreement plaintiffs pleaded as the one made on December 20, 1970. While defendants did acknowledge they had executed *a* written agreement with plaintiffs on that date, they contended it was an entirely different document with vastly different terms – unambiguous terms which could be interpreted only as creating a loan and security contract rather than some form of coownership.

Defendants now characterize this as a dispute over which version was "correct"; it was hardly that. Rather, it was an express denial of the genuineness of the document plaintiffs proffered, offering in its place another which defendants represented *was* genuine. In other words, defendants denied a particular contractual relationship existed and their denial was based on offering a

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[4] There is so great a similarity between the nature and incidents of the relationships of partnership and joint venture that a complaint founded on a theory of partnership will suffice to sustain a judgment even if only a joint venture is proven. (5 Witkin, Cal. Procedure (3d. ed. 1985) Pleading, § 772, p. 217.)

second, sharply differing version of the same contractual document. In sum, the basic theory of the case was that *one* of the parties had falsified the crucial document; the jury concluded defendants had done so and that conclusion is amply supported by the evidence. It is difficult to conceive of a denial the alleged contract exists which could be taken in any worse faith or with any less probable cause. Accordingly, given the instant facts and circumstances, it is clear plaintiffs pleaded and proved a *Seaman's* cause of action.

V

The Comora defendants contend the award of damages to Nancy Radell for emotional distress is improper and must be reversed. The contention is specious.

Inasmuch as defendants assume plaintiffs' *Seaman's* cause of action was fatally flawed, they assert the award of damages for emotional distress cannot be viewed as proper under that theory. However, as noted *ante*, we do *not* view the *Seaman's* cause of action as fatally flawed in its pleading and proof; defendants do not dispute that emotional distress damages generally are recoverable for tortious conduct. (Civ. Code, § 3333.)

Sub rosa, defendants also appear to challenge the sufficiency of the evidence Nancy Radell suffered emotional distress. They acknowledge Mrs. Radell gave testimony which would support such an award, but argue there was no corroborating evidence she suffered emotional distress after learning in March 1984 that defendants contended plaintiffs had no ownership interest in the property. As noted *post*, even the testimony of one

witness, including a party to the proceeding, may be sufficient evidence of a fact. (*In re Marriage of Mix* (1975) 14 Cal. 3d 604, 614; *Edison School Dist. v. Ross* (1982) 131 Cal.App.3d 362, 371.) An exception arises only when that testimony is inherently improbable or incredible, i.e., " 'unbelievable *per se*,' " physically impossible or " 'wholly unacceptable to reasonable minds.' " (*Evje v. City Title Ins. Co.* (1953) 120 Cal.App.2d 488, 492; accord, *Nash v. Prudential Ins. Co. of America* (1974) 39 Cal.App.3d 594, 599.) Mrs. Radell's testimony does not fall into the latter category and her testimony alone hence is sufficient evidence of her emotional distress.

VI

The Comora defendants assert the statement of decision the trial court rendered in determining the equitable issues remaining after the jury trial is erroneous in law and unsupported by the evidence. We perceive no merit in the contention.

Defendants challenge three specific groups of findings recited in the statement of decision. First, defendants challenge the finding that "Plaintiffs took possession of their undivided interest in the Property under the October 19, 1970 Property Agreement and not as mortgagees in possession. Plaintiffs took control of the management and managed the Property under the October 19, 1970 Management Agreement and not as mortgagees in possession. From time to time, in connection with their various lawsuits, [Defendants] caused NANCY RADELL to

assert a status as mortgagee in possession, while privately Plaintiffs and Defendants continued to act as partners and co-owners in possession of the Property . . . .[F]rom and after October 19, 1970 the parties continuously operated as partners and co-owners and . . . by mutual consent and acquiescence NANCY RADELL did not collect the rents and apply them to the reduction of her mortgage or otherwise function as a mortgagee in possession." Defendants argue these findings are utterly contrary to the evidence and erroneous in law.

This court must view the evidence in the light most favorable to the trial court's determination, resolving all conflicts and drawing all reasonable inferences in support thereof. (*Campbell v. Southern Pacific Co.* (1978) 22 Cal.3d 51, 60; *Board of Education v. Jack M.* (1977) 19 Cal.3d 691, 697.) Neither conflicts in the evidence nor " 'testimony which is subject to justifiable suspicion . . . justify the reversal of a judgment, for it is the exclusive province of the [trier of fact] to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends.' " (*Evje v. City Title Ins. Co., supra,* 120 Cal.App.2d at p. 492; quoting from *People v. Huston* (1943) 21 Cal.2d 690, 693.) Even the testimony of one witness, including a party to the proceeding, may be sufficient (*In re Marriage of Mix, supra,* 14 Cal.3d at p. 614; *Edison School Dist. v. Ross, supra,* 131 Cal.App.3d at p. 371) unless that testimony is inherently improbable or incredible, i.e., " 'unbelievable *per se*,' " physically impossible or " 'wholly unacceptable to reasonable minds.' " (*Evje v. City Title Ins. Co., supra,* 120 Cal.App.2d at p. 492; accord, *Nash v. Prudential Ins. Co. of America, supra,* 39 Cal.App.3d at p. 599.)

Defendants rely on three specific evidentiary items. They place foremost reliance on a document typed on "Environmental Urban Systems" letterhead, dated October 21, 1970, which states in pertinent part: "The undersigned, NANCY RADELL, pursuant to the provision of the Deed of Trust . . . assigned to Nancy Radell July 23, 1968, . . . does hereby elect to collect the rent, to enter and take possession of and to manage said property [454 North Oakhurst Drive] until such time as all defaults are cured and the loan is brought to a current status." Defendants also rely on a stipulation that, pursuant to adjudication, Nancy Radell was a mortgagee in possession of the property after December 1973. Finally, they rely on the "uncontroverted" testimony of Attorney Ken Simon. None of this evidence, taken separately or together, mandates the result defendants wish.

Nancy Radell did testify the October 21, 1970 document bears her signature, but she also testified she had no recollection of signing the document or of its contents; it was wholly unfamiliar to her. In addition, as noted *ante*, she testified Margaret Comora often signed her name to checks and other documents; she perfected a signature so identical that Mrs. Radell often could not distinguish between her genuine signature and a Margaret Comora replica of her signature. Margaret Comora admitted she had signed Mrs. Radell's name to various documents over the years; she did not dispute Mrs. Radell's characterization of the identity between the original and the replications. Nancy Radell also testified Margaret Comora often requested that she sign blank sheets of paper for business or legal proceedings and Mrs. Radell complied. Moreover, the October 21, 1970 document was typed on

"Environmental Urban Systems" letterhead. This is a fictitious business name which David Radell acquired prior to that date but used primarily in his management of the Oakhurst property. It is undisputed the October 19, 1970 property agreement and the management agreement of the same date between David Radell and Emanuel Comora were typed on David Radell's typewriter. Clearly, although it is typed on "Environmental Urban Systems" letterhead, the October 21, 1970 document was typed on a vastly different typewriter.

The totality of the evidence substantially supports a factual finding the October 21, 1970 document is not genuine. It is clear Margaret Comora had the opportunity and means of signing Mrs. Radell's name to a document in a manner which appears genuine and also of securing Mrs. Radell's signature on a blank piece of paper which later could be used to "create" such a document. Further, it is readily inferable, inasmuch as David Radell actively managed the Oakhurst property from November 1970 to 1976, utilizing the fictitious business name "Environmental Urban Systems" in the process, that defendants had ample opportunity to secure samples of that letterhead during that period and put them to their own uses.

The stipulation is of no greater value to defendants. It simply acknowledges Nancy Radell was adjudicated to be a mortgagee in possession in December 1973 and thus was one from that date forward. In no manner does the stipulation establish plaintiffs took possession of the property on and after October 19, 1970 in that capacity or, indeed, that Nancy Radell ever *acted* as a mortgagee in possession. There is a wealth of evidence to the contrary. Ample testimony supports the conclusion Nancy Radell

asserted that position in the 1973 Simonds litigation and afterward in the Olsan litigation at the instigation and urging of defendants, who caused certain affidavits, answers to interrogatories and the like to be prepared in Mrs. Radell's name and then submitted them to her only for signature, representing they were "necessary." Both Mrs. Radell and David Radell vehemently denied Mrs. Radell ever made any assertion other than that she was *entitled* to take possession and collect the rents or ever represented in 1970 that she was a mortgagee in possession rather than a partner and coowner. There is no indication in the settlement documents and correspondence exchanged with California Federal Savings and Loan Association that Mrs. Radell was to take over the property as a mortgagee in possession.

In addition, it is unequivocally clear *David* Radell assumed the management of the property on October 19, 1970, pursuant to a written agreement between himself and Emanuel Comora; there is no dispute as to the genuineness of this document. Nowhere does the October 19, 1970 management agreement state David Radell is acting as the agent of Nancy Radell, as mortgagee in possession or otherwise. Indeed, the agreement provides for compensation to be paid David Radell for his services. Nancy Radell never collected the rents, signed checks or managed the property until 1976, when David Radell moved out of the building and ceased managing it. Even then, Margaret Comora kept the accounts and books for the property and generally prepared checks for Mrs. Radell's signature. In the spring of 1981, Margaret Comora took a greater hand in the management of the property.

Finally, defendants' reliance on the purportedly "uncontroverted" testimony of Attorney Simon is spurious. Attorney Simon did testify Nancy Radell elected to become a mortgage in possession rather than a partner and coowner during a meeting in his office on October 21, 1970, but that testimony was not entirely uncontroverted. Nancy Radell testified she was quite ill at the time and left discussions with Attorney Simon to David Radell. David Radell unequivocally contradicted Attorney Simon's testimony that he explained the pros and cons of becoming partners versus mortgagees in possession during a meeting which Mrs. Radell attended; in addition, to the best of his recollection, Mrs. Radell did not attend a meeting with Attorney Simon on October 21. David Radell also denied vehemently that Mrs. Radell ever told Attorney Simon or anyone else she wished to become a mortgagee in possession rather than a coowner/partner.

There is substantial evidence Nancy Radell never received any payments on the trust deed she held. Mr. Spiegel, the building accountant who for more than 10 years prepared tax returns relating to the property, including partnership information returns, received information for the preparation of these returns from Margaret Comora. At no time was Mr. Spiegel informed any mortgage interest payments had been made to Irvin and/or Nancy Radell and none were deducted as an expense on the partnership returns; Margaret Comora confirmed this. In addition, the monthly accountings Margaret Comora prepared clearly indicate Nancy Radell never functioned or received payments as a mortgagee in

possession. Emanuel Comora testified he made no payment of principal to Nancy Radell, as required by the $150,000 promissory note, on or about November 1, 1971; he did not personally make such a payment on or about November 1, 1972, though it "may have come out of the building"; it was "possible" he made such a payment on or about November 1, 1973, but he was not certain; and he did not know whether he made such a payment in 1974.

Moreover, as late as 1983, defendants acknowledged the existence of continuing obligations under the second trust deed Nancy Radell held and the third trust deed David Radell held. They convinced plaintiffs to subordinate these trust deeds to a trust deed in favor of General Bank; all parties mutually signed such a subordination agreement. Further, defendants' receipt of $122,328 in building income versus plaintiffs' receipt of approximately $115,000 in such income is fully consistent with the operation of a partnership, but inconsistent with Nancy Radell's status as a mortgagee in possession. A mortgagee in possession has a duty to collect the rents and profits, take credit for necessary expenses, and apply the balance to the indebtedness. (3 Witkin, Summary of Cal. Law (9th ed. 1987) Security Transactions in Real Property, §§ 91, 92, pp. 597-598.) Had Nancy Radell been functioning in that manner, defendants would have received no portion of the income until the entire indebtedness had been satisfied.

As the trial court found, "[a]t no time did Plaintiffs, or any of them, represent, under oath or otherwise, that they were not partners in possession. At all times, [Defendants] insisted that record title remain in their name, but

[Defendants] represented to Plaintiffs that their partnership and ownership interests were valid and would be protected. Plaintiffs relied on these representations and followed Defendants[']instructions in these various lawsuits, all of which were controlled by [Defendants]." Defendants do not challenge the sufficiency of the evidence to support these latter findings.

In sum, there is substantial evidence indicating defendants induced Nancy Radell to take the position of a mortgagee in possession as a legal fiction intended only to protect the Oakhurst property from defendants' creditors. ~~Hence~~, the trier of fact readily could conclude, while Nancy Radell was legally a mortgagee in possession as of December 1973, she never functioned as such and defendants were fully aware of and concurred in this state of affairs. Indisputably, there is substantial evidence to support the trial court's findings on this subject. (*Campbell v. Southern Pacific Co., supra,* 22 Cal.3d at p. 60; *Board of Education v. Jack M., supra,* 19 Cal.3d at p. 697.)

Defendants next challenge the following findings: "DAVID RADELL holds a valid Deed of Trust on the Property securing an indebtedness originally recorded August 24, 1964. . . .The original balance was $91,646.12 as of August 17, 1964 and interest accrued at 7% per annum. No payments of principal or interest have been made, except for $7,435.87 paid between September 17, 1964 and October 17, 1965 and $29,583.81 paid between February 27, 1972 and January 17, 1977, leaving a balance of principal and interest as of June 1, 1986 of $309,989.08. . . ." Again, defendants argue these findings are wholly unsupported by the evidence.

The trust deed and note in question originally were held by one Dan Markowitz and others, from whom defendants purchased the Oakhurst property. Defendants became involved in litigation with the original note holders concerning an allegedly defective condition of the building on the Oakhurst property.

Defendants and the original note holders reached a settlement of this dispute in 1972 on the following terms, to which plaintiffs were parties: "Markowitz shall assign to David Radell all their right, title and interest in and to said third deed of trust and the promissory note secured by the same . . . without recourse to Markowitz. . . .Irvin and Nancy Radell shall execute in favor of Dan Markowitz their promissory note secured by an assignment of a beneficial interest in said second deed of trust and guaranteed by David Radell, . . . in the principal sum of $25,000 bearing interest at 7% per annum . . . payable in principal and interest installments of $495.10 or more per month on the 15th day of each month commencing on the month following close of escrow, with the entire balance payable on or before the 60th month. . . . Said guaranty of the promissory note by David Radell shall be unconditional. . . . Said security shall consist of an assignment to Dan Markowitz of a beneficial interest from Irvin and Nancy Radell in said second deed of trust of an amount equal to $25,000.00, in which they represent they have sole beneficial interest of $150,000.00. . . . Each party to [this] litigation . . . shall execute a release [which] shall release all other parties . . . from any and all claims . . . excluding only the obligations created by this agreement."

By January 17, 1977, the promissory note that Irvin and Nancy Radell executed in favor of Dan Markowitz in the sum of $25,000 plus interest had been paid in full. David Radell testified he in fact personally paid at least part of these sums. The funds came from David Radell's account for the building and were debited against his management fees and plaintiffs' share of the partnership income. After January 17, 1977, Dan Markowitz returned Irvin and Nancy Radell's promissory note and assignment of an interest in the second trust deed, acknowledging he had received payment in full. There is no evidence David Radell ever received *any* payments of principal or interest on the remaining balance of the Markowitz note which had been assigned to him.

Defendants' position that the promissory note originally held by Dan Markowitz and others was *reduced* to $25,000 and thence paid in full is insupportable on this record. It is unequivocally clear the original note remained intact and was assigned to David Radell in consideration for his guarantee of payment to Mr. Markowitz. Nancy and Irvin Radell executed a *new* promissory note by which *they* became indebted to Mr. Markowitz for $25,000 plus interest. David Radell acted upon his guarantee, seeing that the sums due were timely paid and paying a portion of these amounts personally. There is no evidence he, personally, ever received any payments on the remaining balance of the original note. Hence, the trier of fact reasonably could conclude the principal amount of the assigned note and trust deed remained outstanding and continued to accrue interest, being reduced periodically only by the principal amounts paid to Mr. Markowitz. In sum, the trial court's findings are

supported amply by substantial evidence. (*Campbell v. Southern Pacific Co., supra,* 22 Cal.3d at p. 60; *Board of Education v. Jack M., supra,* 19 Cal.3d at p. 697.)

Finally, defendants challenge the trial court's findings on the issue of an accounting. The statement of decision recites: "Defendants are not entitled to an accounting from Plaintiffs. The First Amended Cross-Complaint does not seek an accounting and Defendants' Answer to the Second Amended Complaint denied Plaintiffs' right to an accounting. The Court finds that since no monies are due from Plaintiffs to Defendants an accounting would be futile. At all times the books and records relating to the Property have been maintained by MARGARET COMORA. The Defendants have been aware of the financial transactions affecting the Property. Until on or about January 1, 1984, the parties acquiesced in these financial transactions and voiced no objections. Based on the applicable statue of limitations no accounting could be granted prior to March 15, 1980 and a partial accounting for the period after that date would serve no useful or equitable purpose."

Defendants do not indicate the manner in which they consider the foregoing findings to be unsupported by the evidence. It is clear defendants did not request an accounting in their first amended cross-complaint; they first made such a request following the jury trial. An accounting is an equitable proceeding which must be pleaded; it is not available as an automatic matter of right. To state a cause of action for an accounting, a party must plead the existence of a fiduciary relationship and a

balance due from the defendant which only can be ascertained by an accounting or the existence of such complicated accounts as to render a demand for a fixed sum impracticable. (5 Witkin, Cal. Procedure, *supra*, Pleading, §§ 768, 769, pp. 215-216.) Not only did defendants fail to plead any of these elements, they actively *denied* they existed. Hence, it is clear their belated request for an accounting was groundless. In addition, there is ample substantial evidence to support the conclusions the books and accounts were at all times in the control of Margaret Comora, defendants were aware of the financial transactions affecting the property, all parties acquiesced in those transactions until roughly January 1, 1984 and plaintiffs owe nothing to defendants.

Neither do defendants indicate how they consider these findings to be prejudicially erroneous in law. They appear to argue plaintiffs were bound by their earlier requests for a full accounting from October 1970 onward. As plaintiffs note, however, their "complete about-face" in requesting, post-trial, an accounting only from January 1, 1984 was based on plaintiffs' acceptance of defendants' own evidence – the 1970 through 1983 distribution figures listed in the Traller accounting (exhibit 129). Plaintiffs did not dispute this accounting which showed defendants received slightly more than 50 percent of the building's income during that period while plaintiffs received slightly less than that amount and received *no* sums other than this share of the building's income.

In actuality, defendants' assertion they have been gravely harmed by the limited period for which an accounting will be rendered is based largely on their assumption the sums paid to plaintiffs must be deemed to

have gone toward the satisfaction of the secured promissory notes plaintiffs hold. As noted *ante*, that simply is not the case. Defendants also argue the Traller accounting is inadequate, in that it does not indicate how much *profit* the building made. However, the partnership information tax returns from 1971 through 1983 were in evidence and *do* indicate clearly how much profit (or loss) was available in each year. Therefore, all necessary evidence is present: the partnership returns indicate the profit or loss for each year, while the Traller accounting indicates actual disbursements and the ratio of payments to defendants and payments to plaintiffs. In sum, defendants have demonstrated neither a legal nor a factual basis upon which the trial court's findings pertaining to an accounting can be deemed erroneous.

VII

Finally, the Comora defendants contend the award of punitive damages is unconstitutional, in that it violates the Fourteenth and Eighth Amendments to the federal Constitution. We disagree.

The jury awarded plaintiffs $249,224.57 in compensatory damages and $1,250,000 in punitive damages. Defendants' constitutional challenge to the punitive damage award is twofold: the imposition of punitive damages (1) violates the due process clause of the Fourteenth Amendment of the United States Constitution and (2) constitutes

an "excessive fine" within the meaning of the Eighth Amendment.[5]

Due Process

The Fourteenth Amendment to the United States Constitution prohibits a state from depriving any person of property without due process of law. Due process requires the government to provide fundamentally fair proceedings, but it " 'is not a technical conception with a fixed content unrelated to . . . circumstances.' [Citation.]" (*Lassiter v. Department of Social Services* (1981) 452 U.S. 18, 24.) To be fundamentally fair, the proceeding must guarantee each party "the opportunity to present his case and have its merits fairly judged." (*Logan v. Zimmerman Brush Co.* (1982) 455 U.S. 422, 433.)

In the present context, defendants argue California's procedure for awarding punitive damages fails to provide them that process to which they are due, in that a jury has virtually unlimited power to punish a defendant – even to the point of financial ruin – without the restraint of any articulable and definite standard. They assert neither Civil Code section 3294[6] nor the common

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[5] The United States Supreme Court recently declined to address similar constitutional challenges in *Bankers Life & Casualty Co. v. Crenshaw* (1988) ___ U.S. ___, 100 L.Ed.2d 62, 71-73. The Supreme Court also denied a petition for a writ of certiorari to the California court of appeal in *Richfield Co. v. Nielsen* (1988) ___ U.S. ___, 100 L.Ed.2d 610.

[6] Civil Code section 3294, subdivision (a), provides: "In an action for the breach of an obligation not arising from contract,

(Continued on following page)

jury instruction, BAJI No. 1471[7], provides any real limits to the jury's discretion. The same argument was addressed and rejected in *Zhadan v. Downtown L. A. Motors* (1976) 66 Cal.App.3d 481, 501-502. In reality, the claim is a variant of earlier constitutional challenges based on the asserted vagueness of Civil Code section 3294, i.e., its failure "to provide sufficient guidance for the trial courts charged with implementing it." (*Bertero v. National General Corp.* (1974) 13 Cal.3d 43, 66, fn. 13.) However, Civil Code section 3294 simply codifies the common law of punitive damages; that body of law "specifically defines which exemplary damages may be awarded and how the amount shall be determined. [Citations.]" (*Ibid.*)

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where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant." Subdivision (c) defines "malice," "oppression" and "fraud" as follows: "(1) 'Malice' means conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others. [¶] (2) 'Oppression' means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights. [¶] (3) 'Fraud' means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury."

[7] BAJI No. 1471 provides: "The law provides no fixed standards as to the amount of such punitive damages, but leaves the amount to the jury's sound discretion, exercised without passion or prejudice."

The primary tenet of the common law on this subject addresses the very purpose of punitive damages. Such damages are intended to punish certain defined classes of civil wrongdoers and deter the commission of similar wrongful acts. Consequently, the appropriate amount of punitive damages is that sum which is necessary "to ensure that the defendant does not repeat his act and that others do not follow his example. [Citation.]" (*Downey Savings & Loan Assn. v. Ohio Casualty Ins. Co.* (1987) 189 Cal.App.3d 1072, 1098, petn. for writ of cert. den. sub nom. *Ohio Casualty Ins. Co. v. Downey Savings & Loan Assn.* (1988) ___ U.S. ___, 100 L.Ed.2d 610.)

The courts are guided "by certain established principles, all of which are grounded in the purpose and function of punitive damages. One factor is the particular nature of the defendant's acts in light of the whole record; clearly, different acts may be of varying degrees of reprehensibility, and the more reprehensible the act, the greater the appropriate punishment, assuming all other factors are equal. [Citations.] Another relevant yardstick is the amount of compensatory damages awarded; in general, even an act of considerable reprehensibility will not be seen to justify a proportionately high amount of punitive damages if the actual harm suffered thereby is small. [Citation.] Also to be considered is the wealth of the particular defendant; obviously, the function of deterrence . . . will not be served if the wealth of the defendant allows him to absorb the award with little or no discomfort. [Citations.] By the same token, of course, the function of punitive damages is not served by an award which, in light of the defendant's wealth and the gravity

of the particular act, exceeds the level necessary to properly punish and deter." (*Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 928.)

The foregoing review of the relevant factors to be considered in determining the amount of an award of punitive damages also demonstrates why that determination is not amenable to fixed standards of mathematical definition. (*Wyatt v. Union Mortgage Co.* (1979) 24 Cal.3d 773, 790.) Of necessity, the calculation of punitive damages involves " 'a fluid process of adding or subtracting depending on the nature of the acts and the effect on the parties and the worth of the defendants' "; it is this process which is committed to the jury's discretion. (*Downey Savings & Loan Assn. v. Ohio Casualty Ins. Co., supra,* 189 Cal.App.3d at p. 1097, quoting from *Walker v. Signal Companies, Inc.* (1978) 84 Cal.App.3d 982, 998.)

The relevant factors need not necessarily be placed before the jury in the form of an instruction to afford sufficient guidance; they are largely a matter of common sense. Moreover, a party may move for a new trial on the ground of excessive damages. (Code Civ. Proc., § 657, subd. 5.) In determining such a motion, the trial court is to examine the entire record and weigh the evidence; if the court is convinced the jury clearly should have reached a different verdict, a new trial shall be granted. (Code Civ. Proc., § 657.) In making such a determination, the trial court of course is guided by the judicial development of those common law legal principles which are the adjunct to Civil Code section 3294. (*Grimshaw v. Ford Motor Co.* (1981) 119 Cal.App.3d 757, 811.)

In determining whether present procedures afford a party "fundamental fairness," the courts examine (1) the private interest affected by the action, (2) the risk of an erroneous deprivation of that interest through the procedure presently used and the probable value of additional safeguards and (3) the government's interest, including the function involved. (*Mathews v. Eldridge* (1976) 424 U.S. 319, 335.) It is, of course, a defendant's property interest which is affected by a determination of whether and in what amount he or she should be liable for punitive damages. A jury presently is afforded no real discretion is determining *whether* a defendant should be liable for punitive damages; the conduct which warrants such an award is defined in careful detail. While a jury *is* presently afforded wide discretion, with little definite guidance, in determining the *amount* in which a defendant should be liable for punitive damages, a high award is immediately subject to attack as excessive in a motion for a new trial. Such an attack affords the defendant with a full judicial review, including a weighing of the evidence, in the light of broadly articulated common law standards.

Given the innumerable combinations of circumstances which may come into play where punitive damages are sought, those standards cannot in all practicality be more narrowly articulated; hence, it is difficult to perceive *any* probability additional safeguards would have value and, indeed, defendants have not suggested any such safeguards. (See *Downey Savings & Loan Assn. v. Ohio Casualty Ins. Co., supra,* 189 Cal.App.3d at p. 1101.) Finally, the government has a clear policy interest in punishing and deterring certain peculiarly reprehensible

forms of civil wrongdoing, particularly where – as here – a fiduciary relationship exists. With fiduciary trust must go responsibility consonant with that trust. (*Egan v. Mutual of Omaha Ins. Co.* (1979) 24 Cal.3d 809, 820.) Upon considering all of the foregoing factors, we conclude the present procedure for fixing the amount of punitive damages to be awarded does not deprive a civil defendant of due process of law.

Defendants also challenge Civil Code section 3294 as unconstitutionally vague in defining the conduct which gives rise to liability for punitive damages. This claim has been soundly rejected over the years by a succession of California cases and merits no further discussion. (See, e.g., *Bertero v. National General Corp., supra,* 13 Cal.3d at p. 66, fn. 13; *Grimshaw v. Ford Motor Co., supra,* 119 Cal.App.3d at p. 811; *Fletcher v. Western National Life Ins. Co.* (1970) 10 Cal.App.3d 376, 404-405; *Toole v. Richardson-Merrell Inc.* (1967) 251 Cal.App.2d 689, 717.)

Eighth Amendment

In part, the Eighth Amendment to the United States Constitution prohibits the imposition of "excessive fines." It is this provision which defendants argue Civil Code section 3294 violates. In general, Eighth Amendment prohibitions apply only to criminal sanctions and not to purely civil penalties. (*Ingraham v. Wright* (1977) 430 U.S. 651, 664; *Downey Savings & Loan Assn. v. Ohio Casualty Ins. Co., supra,* 189 Cal.App.3d at p. 1101.) Defendants, however, place great reliance on footnote 37 of *Ingraham, supra,* at page 669. Footnote 37 does state, "[s]ome punishments, though not labeled 'criminal' by the State, may

be sufficiently analogous to criminal punishments in the circumstances in which they are administered to justify application of the Eighth Amendment." But in relying on this annotation in *Ingraham*, defendants overlook *Downey Savings & Loan Assn., supra*, which does not view punitive damages in this manner.

In any event, there is little difference between a determination of whether a fine is excessive in violation of the Eighth Amendment or whether an award of damages is so excessive as to suggest its origin in the passion and prejudice of the jury. The former determination depends on the objective sought, the importance and magnitude of the public interest to be protected, the circumstances and nature of the action for which the fine is imposed and, in some circumstances, the defendant's ability to pay. (*Traylor v. State* (Del. 1983) 458 A.2d 1170, 1178; *Hindt v. State* (Del. 1980) 421 A.2d 1325, 1333; *Stock v. State* (Alaska 1974) 526 P.2d 3, 18; *State v. Trailer Service, Inc.* (1973) 61 Wis.2d 400, 212 N.W.2d 683, 689.) In essence, these are the factors which are to be considered in determining the appropriate amount of punitive damages to be awarded. To be excessive, a fine must be so disproportionate to the offense as to shock the conscience and exceed the bounds of reason. (*Hindt, supra*, at p. 1333.) An award of punitive damages will be reversed as excessive "only when the entire record viewed most favorably to the judgment indicates the award was the result of passion and prejudice. [Citation.]" (*Downey Savings & Loan Assn. v. Ohio Casualty Ins. Co., supra*, 189 Cal.App.3d at p. 1099.) Again, the standards are closely similar. Hence, at bottom, defendants' claim is simply that the award of punitive damages is excessive as a

matter of law, clearly indicating the jury's abuse of discretion.

Defendants characterize the instant award as "wildly excessive." They argue they are individuals with an inability to insure against liability for such a sanction and this should have a definitive effect on the size of the award. We reject this argument. The ability or inability to insure against reprehensible civil conduct should have no bearing on its punishment.

In addition, defendants assert their incomes are relatively small in relation to the size of the award. The record is devoid of evidence to support this assertion. Evidence of a defendant's financial condition is not essential to the affirmance of an award of punitive damages (*Fletcher v. Western National Life Ins. Co., supra,* 10 Cal.App.3d at p. 404; *Hanley v. Lund* (1963) 218 Cal.App.2d 633, 644), but wealth is an important consideration (*Downey Savings & Loan Assn. v. Ohio Casualty Ins. Co., supra,* 189 Cal.App.3d at p. 1099). In the instant matter, plaintiffs attempted to obtain evidence of defendants' net worth and general financial condition, but defendants successfully rejected their efforts. *No* evidence whatsoever was presented of defendants' total income, net worth or overall wealth. However, wealth need not be measured in this manner; other asset and income factors may be considered. (*Id.*, at p. 1100.)

There was evidence the Oakhurst property, plaintiffs' 50 percent interest in which defendants attempted to usurp, had a fair market value of at least $4,000,000. In addition, the jury knew the income flow of the Oakhurst property and knew plaintiffs held nearly $250,000 in

promissory notes from defendants on which plaintiffs asserted little or no principal or interest had been paid, but which defendants contended had been paid in full inasmuch as plaintiffs had no interest in the Oakhurst property. This information provided the jury with some reasonable gauge both of the reprehensibility of defendants' conduct and the size of an award which would achieve the statutory punitive and deterrent purposes.

No fixed ratio determines the proper proportion between punitive and compensatory damages. (*Id.*, at p. 1097; *Moore v. American United Life Ins. Co.* (1984) 150 Cal.App.3d 610, 636.) In general terms, punitive damages must bear a reasonable relationship to compensatory damages, but the "reasonable relationship" rule exists only to guard against clear excess. (*Finney v. Lockhart* (1950) 35 Cal.2d 161, 164.) High ratios of punitive damages to compensatory damages generally are upheld and an award of punitive damages many times greater than compensatory damages is not, as a matter of law, excessive. (*Downey Savings & Loan Assn. v. Ohio Casualty Ins. Co., supra*, 189 Cal.App.3d at p. 1098.) Here, the award of punitive damages is roughly five times greater than the award of compensatory damages; given its size, it cannot be deemed excessive as a matter of law. Moreover, considering all the facts, it does not appear to be excessive in the instant circumstances. Accordingly, the award is affirmed.

VIII

The Comora plaintiffs assert the trial court erred in dismissing their complaint after sustaining a demurrer

without leave to amend and in imposing sanctions pursuant to Code of Civil Procedure section 128.5. The assertion lacks any discernible merit.

On October 15, 1986, Aileen, Madeleine and Sian Comora, the daughters of Emanuel and Margaret Comora and beneficiaries of the Comora family trust, filed a complaint against various members of the Radell family. The Comora plaintiffs sought to quiet title to the Oakhurst property, to take possession thereof, to impose a constructive trust and to secure an accounting of funds defendants allegedly received in respect to the Oakhurst property. In addition, plaintiffs sought reformation of the deed which conveyed the Oakhurst property to Emanuel and Margaret Comora as trustees of the Comora family trust, the October 19, 1970 property agreement between Emanuel Comora and Irvin, Nancy and David Radell, and the June 30, 1981 agreement between these same parties.

Finally, plaintiffs alleged defendants' conversion of the property and a conspiracy among the defendants to convert rents and profits therefrom, to misrepresent amounts owing on the promissory notes and trust deeds held by defendants and to suborn perjury in the preceding action. Plaintiffs sought a temporary restraining order, as well as preliminary and permanent injunctions, to prevent the partition of the property by sale on October 16, 1986. In other words, these plaintiffs sought to relitigate the very issues decided in the preceding action.[8]

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[8] Even the issue of perjured testimony was determined in the preceding action. In its statement of decision in WEC

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Plaintiffs' ex parte application for a temporary restraining order was heard on October 15, 1986. The trial court denied the application, stating plaintiffs essentially wanted the court to act "as a court of appeal and conclude there was perjured testimony in the trial [of WEC 86104] and the judgment that the Court issued ought not to be given credit"; the trial court termed the application "outrageous." Plaintiffs thereafter moved for reconsideration; the trial court denied the motion and imposed sanctions of $4,798.75.

Defendants demurred to the complaint on the grounds the judgment in WEC 86104 was res judicata and the complaint amounted to an improper collateral attack on that judgment, alleging intrinsic fraud only. The trial court sustained the demurrer without leave to amend and imposed sanctions of $4,000.

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86104, the trial court made the following pertinent findings: "The Court has considered all of the evidence in this matter and accepts the Verdicts and Special Findings of the jury . . . . While the Court has exercised its independent judgment, the Court has taken the Verdicts and Special Findings into consideration on matters of believability . . . . The Court finds that EMANUEL M. COMORA and MARGARET B. COMORA each willfully testified falsely on material points and that from all the evidence, the probability of truth does not favor their testimony in other particulars. . . . The court accepts the testimony of IRVIN RADELL, NANCY RADELL and DAVID RADELL as credible on all material controverted issues." In addition, upon denying the Comora defendants' motion for new trial and judgment n.o.v., the trial court opined the evidence overwhelmingly supported the jury's verdict.

The Comora plaintiffs argue their rights, as beneficiaries of the Comora family trust, could not have been determined in the former action, in that they are indispensable parties who were not joined in that action. An indispensable party is one whose interest in the subject matter of the litigation would be injured or affected if he or she was not joined and the plaintiff was granted the affirmative relief sought. (Code Civ. Proc., § 389, subd. (a)(2)(i); *Bank of California v. Superior Court* (1940) 16 Cal.2d 516, 522.)

Typically, this is the case "where a number of persons have undetermined interests in the same property . . . and one of them seeks, in an action, to recover the whole, to fix his share, or to recover a portion claimed by him. The other persons with similar interest are indispensable parties. The reason is that a judgment in favor of one claimant for part of the property or fund would necessarily determine the amount or extent which remains available to the others. Hence, any judgment in the action would inevitably affect their rights." (*Id.*, at p. 521; accord, *Bowles v. Superior Court* (1955) 44 Cal.2d 574, 583.)

A person also may be indispensable if there is a substantial risk a party to the action may incur duplicative liability by virtue of the unjoined person's interest. (Code Civ. Proc., § 389, subd. (a)(2)(ii).) However, there must be more than a theoretical possibility he or she would assert a claim that could result in multiple liability; the risk "must be substantial as a practical matter." (*Union Carbide Corp. v. Superior Court* (1984) 36 Cal.3d 15, 21.)

Even if a party otherwise may be considered indispensable, the trustee of a strict trust, i.e., one with legal title to the trust property, may sue or be sued in actions affecting trust property without joining the beneficiaries. (Code Civ. Proc., § 369; *Thorpe v. Story* (1937) 10 Cal.2d 104, 114; *Powers v. Ashton* (1975) 45 Cal.App.3d 783, 787; 4 Witkin, Cal. Procedure, *supra*, Pleading, § 117, p. 153.) Where the trustee is a party to the action in his or her representative capacity, the beneficiaries are bound by the judgment. (*Armstrong v. Armstrong* (1976) 15 Cal.3d 942, 951; *Murdock v. Eddy* (1940) 38 Cal.App.2d 551, 554; 7 Witkin, Cal. Procedure, *supra*, Judgment, § 292, pp. 728-729.)

The sole exception to the foregoing exists when the controversy is between the beneficiaries, between the trustee and trustor or between the trustee and the beneficiaries. In such an event, the trustee is representative of no other class and the matter falls outside the confines of Code of Civil Procedure section 369. (*Lake v. Dowd* (1929) 207 Cal. 290, 293; *Mitau v. Roddan* (1906) 149 Cal. 1, 7-8; *Delno v. Market St. Ry. Co.* (1944) 63 Cal.App.2d 489, 498-499; *De Olazabal v. Mix* (1937) 24 Cal.App.2d 258, 261.)

By no stretch of the imagination do plaintiffs fall within this exception to the operation of Code of Civil Procedure section 369. The preceding action between the Radells and Emanuel and Margaret Comora clearly involved conflicting claims to varying interests in the same property. That property assertedly had been transferred from Emanuel Comora to Emanuel and Margaret Comora as trustees of the Comora family trust; in that capacity, they were parties to the action. Plaintiffs could have had no interest in the Oakhurst property other than

that possessed by Emanuel Comora when he executed a quitclaim deed in favor of the trustees. (*McDonald v. Edmonds* (1872) 44 Cal. 328, 330; *Taylor v. Coachella Valley Water Dist.* (1952) 108 Cal.App.2d 743, 745.) Consequently, their interests in defending against the Radells' complaint and prosecuting the trustees' cross-complaint were identical with those of the trustees.

Plaintiffs place undue emphasis on language in *De Olazabal v. Mix, supra,* 24 Cal.App.2d at page 261 which construes section 369 as applying only to legal actions against "strangers." They argue section 369 therefore cannot apply to them, in that the Radells and the Comoras are intimately related. Irvin and Nancy Radell, David and Mary Radell and Emanuel and Margaret Comora all met with Attorney Alef to form the same type of family trust as an estate planning device, the Irvin Radell's trust named Margaret Comora as a beneficiary and the Radells knew the form and purpose of the Comora family trust. None of these facts has any relevance. As *Delno v. Market St. Ry. Co., supra,* 63 Cal.App.2d notes at page 499, section 369 applies when trustees are parties to lawsuits affecting trust property as against *strangers to the trust instrument.* Indisputably, the Radells were strangers to the Comora declaration of trust: they were named neither as trustors, trustees nor as beneficiaries.

Plaintiffs also rely on the principle that a judgment will not be given res judicata effect where a party has been deprived of a fair adversary hearing in which to fully present his or her case. (*Greenfield v. Mather* (1948) 32 Cal.2d 23, 35.) The principle has no application to the instant matter. As noted *ante,* plaintiffs received a fair adversary hearing in which any case they could have

made was fully presented; their interests were amply forwarded by the trustees acting in their representative capacities. Plaintiffs rely even more heavily on a corollary principle, that res judicata "is not to be applied so rigidly as to defeat the ends of justice" or important policy considerations. (*Guardianship of Di Carlo* (1935) 3 Cal.2d 225, 235.) They assert the "newly discovered evidence" they presented at their motion for reconsideration clearly showed the Radells had perjured themselves and submitted false documents in the preceding action; thus, giving res judicata effect to that judgment would defeat the ends of justice.

In essence, plaintiffs assert only that the judgment in WEC 86104 was secured by means of intrinsic fraud. It has long been established intrinsic fraud is that which occurs during a trial, in the presentation of false evidence or by other means. (*Pico v. Cohn* (1891) 91 Cal. 129, 134; 8 Witkin, Cal. Procedure, *supra*, Attack on Judgment in Trial Court, § 221, pp. 625-626.) It is equally well established this is not a ground for equitable relief from a judgment and it will not lose its res judicata effect for fraud which is intrinsic only. (*Eichman v. Fotomat Corp.* (1983) 147 Cal.App.3d 1170, 1175-1176; *In re Marriage of Maxfield* (1983) 142 Cal.App.3d 755, 760; *Kachig v. Boothe* (1971) 22 Cal.App.3d 626, 632-633.) Accordingly, this affords plaintiffs no better escape from the res judicata effect of the judgment in WEC 86104. A party simply will not be permitted, by filing a collateral action, to attempt to relitigate issues already tried and determined. (*Ford v. Superior Court* (1986) 188 Cal.App.3d 737, 741-742.)

Where a complaint sets forth all the facts which show the action is barred by the doctrine of res judicata, it

properly is attacked by general demurrer. (*Olwell v. Hopkins* (1946) 28 Cal.2d 147, 152.) That is the case here. Plaintiffs' complaint sets forth all the facts attending the preceding action and identifies the parties thereto and the result. A demurrer must be sustained where the facts alleged do not entitle the plaintiffs to relief under any possible legal theory. (See *Barquis v. Merchants Collection Assn.* (1972) 7 Cal.3d 94, 103.) As discussed above, it is unequivocally clear plaintiffs are not entitled to relief under any conceivable legal theory; neither is there any possibility amendment would cure the complaint's defects. Hence, it was appropriate to sustain the demurrer without leave to amend. (*Minsky v. City of Los Angeles* (1974) 11 Cal.3d 113, 118-119.)

Plaintiffs do not challenge the trial court's denial of the motion for reconsideration made after their application for a temporary restraining order was denied, but they do challenge the propriety of the sanctions the court imposed. Code of Civil Procedure section 128.5, subdivision (a), permits the trial court to order a party, the party's attorney or both "to pay any reasonable expenses, including attorney's fees, incurred by another party as a result of bad-faith actions or tactics that are frivolous or solely intended to cause unnecessary delay." Those actions or tactics that may incur sanctions where appropriate "include, but are not limited to, the making or opposing of motions or the filing and service of a complaint . . . ." (Subd. (b)(1).) Such actions or tactics are frivolous if they are "(A) totally and completely without merit or (B) for the sole purpose of harassing an opposing party." (Subd. (b)(2).)

The trial court possess broad discretion to impose sanctions pursuant to section 128.5; it is entitled to " 'guard against inept procedures and unnecessary indulgences which would tend to hinder, hamper or delay the conduct and dispatch of its proceedings.' [Citation.]" (*Ellis v. Roshei Corp.* (1983) 143 Cal.App.3d 642, 648-649.) A decision to impose sanctions will not be set aside unless the court clearly has abused its discretion. (*Luke v. Baldwin-United Corp.* (1985) 167 Cal.App.3d 664, 668.)

The simple fact a motion or opposition thereto is based on a misunderstanding of the law and thus without merit does not render it frivolous or made in bad faith. (*Garcia v. Sterling* (1985) 176 Cal.App.3d 17, 22.) However, while the punishment of sanctions should be used most sparingly and may be inappropriate in the absence of evidence of subjective bad faith or improper motive (*id.*, at pp. 22-23), there need not be evidence of subjective bad faith in every case; it is permissible to infer bad faith objectively from an utter lack of any conceivable merit. (Cf. *In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 650.)

It is important to remember that "[a]n attorney in a civil case is not a hired gun required to carry out every direction given by the client. [Citation.]" (*Cosenza v. Kramer* (1984) 152 Cal.App.3d 1100, 1103.) As a professional, counsel " ' "has an obligation to not only protect his client's interests, but also to respect legitimate interests of fellow members of the bar, the judiciary, and the administration of justice." ' [Citation.]" (*Ellis v. Roshei Corp., supra,* 143 Cal.App.3d at p. 649.) Accordingly, "[t]he trial bar must clearly note that technically correct procedures, pleadings or processes may not insulate them from the sanction power of the court under section 128.5

if the court finds the other factors present, i.e., that the procedures employed are not utilized in good faith, are frivolous or cause unnecessary delay." (*Ibid.*)

A party may move for reconsideration when an application for an order has been denied "based upon an alleged different state of facts" (Code Civ. Proc., § 1008, subd. (a)), but he or she must show by affidavit "what new facts are claimed to be shown" (subd. (b)). The facts not only must be new; they must be newly discovered. (*Blue Mountain Development Co. v. Carville* (1982) 132 Cal.App.3d 1005, 1013.)

Plaintiffs' motion for reconsideration was supported by no "new facts" whatsoever. To substantiate this claim, plaintiffs submitted a declaration, dated August 4, 1986, which had been filed in the preceding action and another declaration, dated October 15, 1986, which had been filed as part of their ex parte application for a temporary restraining order – the very object of the motion for reconsideration. *No* reasonable attorney could have perceived the facts set forth in these declarations as newly discovered and the motion for reconsideration thus was utterly devoid of any conceivable merit. In a word, it was frivolous and the trial court clearly recognized this. The court informed plaintiffs' counsel, "you can't do an end run with a specious claim" and characterized the motion accurately as a "spurious argument," "an incredible position." In the eyes of the court, it was "a classic case for Code of Civil Procedure section 128.5 sanctions."

The trial court further concluded the motion was brought "in bad faith for purposes of delay. The effect to avoid the judgment [in WEC 86104] is transparent. . . .

The effort to have another Los Angeles Superior Court Department act to avoid the effect of the Court's judgment in the West District will not be countenanced." Based on the record before this court, these conclusions are eminently reasonable and well supported by the facts. Accordingly, it is clear the trial court did not abuse its discretion in imposing sanctions for bringing the motion to reconsider.

Plaintiffs also challenge the trial court's imposition of sanctions upon sustaining the demurrer without leave to amend. After sanctions were awarded upon the denial of plaintiffs' motion for reconsideration, defense counsel demanded dismissal of the "groundless" complaint with prejudice and warned plaintiffs' counsel defendants would seek additional sanctions if plaintiffs continued in their opposition to the demurrer and did not dismiss the complaint.

Upon hearing the demurrer, the court characterized the arguments of plaintiffs' counsel as "illogical," "as off-base as it possibly could be," "legal gibberish" and "just the old theory that if you can't baffle them with brilliance, you try to do it with all this." Thereafter, the court admonished counsel, "you are overlooking everything. You are making false theories. There is absolutely no way this case can ever go. It's already been decided. It seems to me that you are either entirely mistaken on the law, or I am more and more inclined to think that you are just being frivolous." The trial court summarized its findings as follows: "There's an awful lot of authority that this is just a transparent, to use the words of my colleague, a transparent end-run around the effect of the Santa Monica case. In this matter, the . . . court cannot begin to cite

all the reasons for sustaining [the demurrer] without leave. The plaintiff has filed voluminous opposition to the demurrer, all in an effort to obfuscate the holding of the West District case."

In granting the request for sanctions, the court found "that this action is, to use the word classic is probably an understatement, but is frivolous as being . . . entirely – if I can I will underline entirely – . . . without merit, is an attempt to attack a valid judgment in the Superior Court through another Superior Court action and totally without redeeming social features. It should never have been filed, never should have been pursued, is entirely, 110 percent worthless all within the statutory definition of frivolous under [section] 128.5. In this event it has been filed to hinder or delay the effect of the West District Judgment."

As elucidated in our discussion, *ante*, it is inconceivable any reasonable attorney could have perceived a scintilla of merit in the complaint. It is so utterly devoid of any arguable basis as to lead inevitably to the conclusion if was filed solely for the purpose of delay. In sum, the trial court's conclusions are eminently reasonable and well grounded in the record. In no sense can it be said the trial court abused its discretion in awarding additional sanctions upon sustaining the demurrer without leave to amend.

Respondents (the Radells) have filed a motion for sanctions in the amount of $450,000. This motion is directed at both appeals consolidated herein. The Comora defendants raised a number of issues of arguable merit in this appeal; indeed, at most only contentions III and VI

could be termed frivolous. Respondents' motion also explicates a number of instances they consider to be unwarranted delay which in itself should justify sanctions. However, the record in this case is monstrous and we found it necessary to review most of it. Hence, we would not characterize the delays as so unwarranted as to justify the conclusion an appeal which indisputable limits itself almost entirely to issues of arguable merit is, nonetheless, frivolous. Thus, we conclude the Comora defendants' appeal is not frivolous and decline to grant sanctions therein.

The same cannot be said of the Comora plaintiffs' appeal. It is clear the appeal is as utterly frivolous as was the filing of the complaint and opposition to the demurrer. (*In re Marriage of Flaherty, supra*, 31 Cal.3d at p. 650.)

The judgment and orders are affirmed. Respondents are to recover costs on appeal and appellants Aileen, Madeleine and Sian Comora are ordered to pay to respondents $5,000 in sanctions.

CERTIFIED FOR PARTIAL PUBLICATION

SPENCER, P.J.

We concur:

HANSON, J.

DEVICH, J.

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

IRVIN RADELL, NANCY RADELL and DAVID RADELL, Plaintiffs and Respondents, v. MARGARET B. COMORA, EMANUEL M. COMORA, etc., et al., Defendants and Appellants.	B022114 consol. with B024866 (Super. Ct. Nos. WEC86104, C620793)
AILEEN COMORA, etc., et al., Plaintiffs and Appellants, v. IRVIN RADELL, NANCY RADELL, DAVID RADELL, et al., Defendants and Respondents.	*ORDER MODIFYING OPINION* (Filed Jul 21, 1989)

THE COURT:

The opinion in the above-captioned matter, filed on June 28, 1989, is modified as follows:

On page 4., at the end of line 12, add as footnote 5 the following:

> [5]Nothing we have said herein is intended to stand for the proposition that a written contract is essential to the maintenance of a *Seaman's* cause of action.

This footnote will require renumbering of all subsequent footnotes.

ORDER DENYING REVIEW

AFTER JUDGMENT BY THE COURT OF APPEAL

Second Appellate District, Division One,
No. B022114, B024866, S011466

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

IN BANK

IRVIN RADELL Et Al., Respondents

v.

MARGARET B. COMORA Et Al., Appellants

And Companion Case

(Filed Sep 21, 1989)

Appellant's petition for review DENIED.

The Reporter of Decisions is directed not to publish in the Official Appellate Reports the opinion in the above-entitled appeal filed June 28, 1989, which appears at 211 Cal.App.3d 1244. (Cal. Const., Art. VI, section 14; Rule 976, Cal. Rules of Court.)

LUCAS

Chief Justice

SUPREME COURT OF THE UNITED STATES

No. A-436

Margaret B. Comora, Emanuel M. Comora, et al.,

Petitioners

v.

Irvin Radell, Nancy Radell and David Radell

ORDER

UPON CONSIDERATION of the application of counsel for the petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including January 19, 1990.

/s/ Sandra D. O'Connor

Associate Justice of the Supreme Court of the United States

Dated this 7th
day of December, 1989.